313 U.S. 575 (25)

FILED
MAR 29 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 902

ARMATURE EXCHANGE INCORPORATED, a corporation, also known as THE ARMATURE EXCHANGE, a corporation, also known as THE ARMATURE EXCHANGE INCORPORATED, a corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals, Ninth Circuit and Brief In Support Thereof.

EDWIN A. MESERVE,
of
MESERVE, MUMPER & HUGHES,
615 Richfield Building, Los Angeles,
Solicitors for Petitioner.

DARIUS F. JOHNSON,
Of Counsel.

Parker & Baird Company, Law Printers, Los Angeles.

SUBJECT INDEX.

PAGE

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Ninth Circuit..... 1

Summary and Short Statement of the Matter Involved..... 2

Question Involved 3

Reasons Relied on for Allowance of the Writ..... 4

1. The Circuit Court of Appeals for the Ninth Circuit Has Decided an Important Question of Federal Law Which Has Not, But Should Be Settled by This Court.. 4

2. The Circuit Court of Appeals for the Ninth Circuit Has Decided an Important Question of General Law in a Way Probably Untenable or in Conflict With the Weight of Authority..... 6

Brief in Support of Petition for Writ of Certiorari..... 9

Jurisdiction 9

Opinions and Decree Below..... 10

Statement of Facts..... 10

Specifications of Error..... 11

Argument 12

Point I.

The Circuit Court of Appeals erred in deciding that the operations of petitioner in rewinding burned out or damaged armatures constituted manufacturing or production of automobile parts or accessories within the purview of Section 606(c) of the Internal Revenue Act of 1932..... 12

PAGE

(a) Manufacturing or production consists of the application of labor or skill by hand or machinery so that, as a result thereof, a new, different and useful article of commerce is produced 12

(b) The mere repair, restoration or reconditioning of an article does not constitute manufacturing or production 20

Point II.

The Circuit Court of Appeals erred in holding that Congress must be taken to have approved the administrative construction of Article 4. Regulations 46, approved June 18, 1932, and Section 606(c) of the Internal Revenue Act of 1932, by reason of the reenactment of the statute taxing the manufacturing and production of automobile parts and accessories without material change 31

(a) Treasury regulations do not acquire the force and effect of law until they have been recognized and settled by court decree 31

(b) Taxing statutes must be strictly construed and should be so construed as to produce uniformity and equality in their application. Their provisions cannot be extended by implication 33

Point III.

The Circuit Court of Appeals erred in holding that the burned-out armatures were discarded armatures and had lost their commercial value 39

Conclusion 40

TABLE OF AUTHORITIES CITED.

CASES. PAGE

Alaska Consolidated Canneries v. Territory of Alaska (C. C. A. 9), 16 Fed. (2d) 256 36
American Fruit Growers, Inc., v. Brogdex Co., 283 U. S. 1 17
Anheuser-Busch Brewing Ass'n v. United States, 207 U. S. 556 ..... 6, 15
Armature Rewinding Co. v. United States, C. C. H., Standard Federal Tax Service, Vol. 4, para. 9691 ..... 4, 5
Bankers Trust Co. v. Bowers (C. C. A. 2), 295 Fed. 89 36
Bardet v. United States, C. C. H., 1938 Standard Federal Tax Service, Vol. 4, para. 9530 4
Becker-Florence Co. v. United States, C. C. H., 1939 Standard Federal Tax Service, Vol. 4, para. 9259 4
Cadwalader v. Jessup and Moore, 149 U. S. 350 ..... 6, 27
City of Louisville v. Zinmeister (Ky.), 222 S. W. 958 35
Clawson & Bals v. Harrison, 108 Fed. (2d) 991 ..... 28, 30
Con-Rod Exchange, Inc., v. Henricksen, 28 Fed. Supp. 924 4
Erskine v. United States (C. C. A. 9), 84 Fed. (2d) 690 36
Foglesong Machinery Co. v. Randall (C. C. A. 1), 112 Fed. 893 6
Foglesong Machine Co. v. Randall Co. (C. C. A. 6), 239 Fed. 893 24
Goodyear Shoe Machine Co. v. Jackson (C. C. A. 1), 112 Fed. 146 ..... 25, 26
Hartranft v. Wiegmann, 121 U. S. 609 ..... 35, 37
Hempy-Cooper Manufacturing Co. v. United States, C. C. H., 1937 Standard Federal Tax Service, Vol. 4, para. 9421 4
Hess-Bright Mfg. Co. v. Bearing Co., 271 Fed. 350 21
Hughes v. City of Lexington, 277 S. W. 981 ..... 6, 18
J. Leslie Morris Co., Inc., v. United States, C. C. H., 1940 Standard Federal Tax Service, Vol. 4, para. 9608 ..... 4, 5

PAGE

Klepper v. Carter (C. C. A. 9), 286 Fed. 379 14
Koshland v. Helvering, 298 U. S. 441 31
Miller v. Standard Nut Margarine Co., 284 U. S. 498 36
Miller Hatcheries v. Incubator Co. (C. C. A. 8), 41 Fed. (2d) 619 26
Monteith Bros. Co. v. United States, C. C. H., 1936 Standard Federal Tax Service, Vol. 4, para. 9492 4
Moroloy Bearing Service Co. v. United States, C. C. H., 1940 Standard Federal Tax Service, Vol. 4, para. 9619 4
Spreckels Sugar Refining Co. v. McClain (C. C. A. 3), 113 Fed. 244 37
State v. J. J. Newman Lumber Co. (Miss.), 59 So. 923 ..... 6, 26
Thurman, Collector, v. Swissheld et al. (C. C. A. 7), 36 Fed. (2d) 350 ..... 6, 14, 15
Wilson v. Simpson, 9 How. 109 ..... 6, 20

RULES AND REGULATIONS.

Regulations 46, Art. 4 11
Revised Rules of the United States Supreme Court, Rule 38, Subsec. 5(b) 10

STATUTES.

Internal Revenue Act of 1932, Sec. 606(c) 2, 3, 4, 6, 11, 31
Judicial Code, Sec. 240(a), as amended by the Act of February 13, 1925 (28 U. S. C. A. 347) 9

TEXTBOOKS.

Commerce Clearing House, 1939 Standard Federal Tax Service, Vol. 4, para. 9219 28

INDEX TO APPENDIX.

CASES.

PAGE

A. P. Bardet and E. Bardet, Co-partners, Doing Business as the Pioneer Motor Bearing Co., Plaintiffs, v. United States of America, Defendant 14

Armature Rewinding Company, a Corporation, Plaintiff, v. United States of America, Defendant..... 43

Clawson and Bals, Inc., a Corporation, v. Carter H. Harrison, Collector of Internal Revenue in and for the First District of Illinois 28

Hempy-Cooper Manufacturing Company, a Corporation, Plaintiff, v. United States of America, Defendant..... 5

J. Leslie Morris Company, Inc., Plaintiff, v. United States of America, Defendant 39

Leo G. Becker and Fred Florence, Doing Business as the Becker-Florence Electric Company, Plaintiff, v. United States of America, Defendant..... 21

Monteith Brothers Company, Plaintiff, v. United States of America, Defendant 1

Moroloy Bearing Service of Oakland, Ltd., a Corporation, Plaintiff, v. United States of America, Defendant..... 37

MISCELLANEOUS.

Internal Revenue Bulletin, Cumulative Bulletin XII-1, p. 384, Regulations 46, Art. 19, Scope of Tax, XII-11-6072. S. T. 648. Taxability of Retreaded and Rebuilt Tires..... 57

STATUTE.

Revenue Act of 1932, Sec. 606(c), Parts and Accessories..... 56

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. .....

ARMATURE EXCHANGE INCORPORATED, a corporation, also known as THE ARMATURE EXCHANGE, a corporation, also known as THE ARMATURE EXCHANGE INCORPORATED, a corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, The Armature Exchange, respectfully shows to this Honorable Court that this is a petition for a writ of certiorari to the Circuit Court of Appeals, Ninth Circuit, to review a decision made and entered by this court on January 17, 1941, reversing the decision of the District Court of the United States for the Southern District of California, Central Division.

Summary and Short Statement of the Matter Involved.

This suit was instituted to recover $1,452.30 in excise taxes assessed and paid under section 606 (c) of the Internal Revenue Act of 1932 [R. Vol. 1, p. 2], on the sale of rewound automobile generator armatures. The part of the above statute which is applicable to this suit reads as follows:

> "Section 606. Tax on automobiles, etc. There is hereby imposed upon the following articles sold by the manufacturer. producer, or importer, a tax equivalent to the following percentages of the price for which so sold: * * *
>
> "(c) Parts or accessories (other than tires and inner tubes) for any of the articles enumerated in subsection (a) or (b), 2 per centum. * * *." (Note—Subsection (a) and (b) referred to enumerate automobiles, automobile trucks and motorcycles.)

The tax was assessed by the Commissioner of Internal Revenue on the theory that the petitioner was the manufacturer or producer of the armatures which it repaired by rewinding and later sold. In ninety-five per centum of the transactions the petitioner exchanged armatures which it had repaired by rewinding, for burned out armatures of an identical type and an additional cash consideration for their repair service.

The mechanics of rewinding the armatures is in brief as follows:

Armatures on which the wiring has been burned out or damaged were repaired by removing the burned out or damaged coils of copper wire and replacing same with new wire and proper insulation. Ninety-five per centum of the damaged armatures were received from plaintiff's

customers [R. 97] who would exchange them for armatures of the identical type which had previously been repaired, appropriately identified, and placed in petitioner's stock of rebuilt armatures maintained for the convenience of its customers. The remaining five percent were purchased from dealers in secondhand armatures. [R. 97.] In repairing the armatures the only part removed was the wire winding. [R. 75-76.] Said armatures were not further dismantled and the original identification marks were not removed. [R. 11.]

The District Court held as evidenced by its opinion [R. 11] that the tax was improperly assessed by reason of the fact that the petitioner was not the manufacturer or producer of the armatures involved, but only the repairer thereof.

The United States Circuit Court of Appeals for the Ninth Circuit reversed the judgment of the District Court, holding that the operations of petitioner in the rewinding and selling of said armatures constituted manufacturing or producing within the meaning of the statute involved. [R. 122.]

The Armature Exchange filed a petition for rehearing on February 15, 1941, which was denied on February 18, 1941. [R. 130.]

Question Involved.

Whether sales of automobile generator armatures which had been repaired by rewinding same were taxable under section 606 (c) of the Internal Revenue Act of 1932, imposing a tax upon automobile parts, "sold by the manufacturer, producer or importer."

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals for the Ninth Circuit Has Decided an Important Question of Federal Law Which Has Not, But Should Be Settled by This Court.

Section 606 (c) of the Internal Revenue Act of 1932 has been construed by seven different United States District Court judges in deciding eight cases adversely to the government, four of these cases involved rewound armatures, three involved rebabbitted connecting rods, and one case involved both of said items. *Hempy-Cooper Manufacturing Co. v. United States,* C. C. H., 1937 Standard Federal Tax Service, Vol. 4, para. 9421; *Monteith Bros. Company v. United States,* C. C. H., 1936 Standard Federal Tax Service, Vol. 4, para. 9492; *Bardet v. United States,* C. C. H., 1938 Standard Federal Tax Service, Vol. 4, para. 9530; *Becker-Florence Co. v. United States,* C. C. H., 1939 Standard Federal Tax Service, Vol. 4, para. 9259; *Moroloy Bearing Service Co. v. United States,* C. C. H., 1940 Standard Federal Tax Service, Vol. 4, para. 9619; *J. Leslie Morris Co., Inc. v. United States,* C. C. H., 1940 Standard Federal Tax Service, Vol. 4, para. 9608; *Con-Rod Exchange, Inc. v. Henricksen,* 28 Fed. Supp. 924; *Armature Rewinding Co. v. United States,* C. C. H., Standard Federal Tax Service, Vol. 4, para. 9691.

Several of the above cases are not reported in the National Reporter System. For the convenience of this

court the decisions in these cases taken from Commerce Clearing House Standard Federal Tax Service is set forth in the appendix to this brief.

Two of the above cited cases, namely, *The Armature Rewinding Company v. United States* and *J. Leslie Morris Company v. United States,* are on appeal to the United States Circuit Court of Appeals for the Eighth Circuit, and for the Ninth Circuit, respectively. The decision of the question involved in the instant case will ultimately affect and probably determine the final decision of the two cases last mentioned and it is believed will affect many other cases in the various courts of the United States. The question is one which should be decided by this Honorable Court to prevent a multiplicity of suits and to insure uniformity of application of the taxing statute here involved.

2. The Circuit Court of Appeals for the Ninth Circuit Has Decided an Important Question of General Law in a Way Probably Untenable or in Conflict With the Weight of Authority.

The Circuit Court of Appeals for the Ninth Circuit has decided that the rewinding of burned out or damaged automobile generator armatures constitutes manufacturing or production of automobile parts within the purview of section 606 (c) of the Internal Revenue Act of 1932.

This decision is in conflict with the weight of authority as announced in decisions of this Honorable Court as well as decisions of the United States Circuit Courts of Appeals, United States District Courts and the State Courts.

The question of what constitutes manufacturing has been decided by the courts many times in the past. One of the leading cases is *Anheuser-Busch Brewing Association v. United States,* 207 U. S. 556. In deciding the case Mr. Justice McKenna said in part:

> "There must be transformation; a new and different article must emerge, having a distinctive name, character or use! This cannot be said of the corks in question. A cork put through the claimant's process is still a cork."

See also *Cadwalader v. Jessup and Moore,* 149 U. S. 350; *Wilson v. Simpson,* 9 Howard 109; *Thurman, Collector v. Swisshelm, et al.* (C. C. A. 7), 36 Fed. (2d) 350; *Foglesong Machinery Co. v. Randall Co.* (C. C. A. 1), 112 Fed. 893; *Hughes v. City of Lexington,* 277 S. W. 981; *State v. J. J. Newman Lumber Co.,* 59 So. 923.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and to send to this court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on this docket, No. 9469. "United States of America, Appellant, v. Armature Exchange Incorporated, a corporation, also known as The Armature Exchange, a corporation, also known as The Armature Exchange Incorporated, a corporation, Appellee," and that said judgment of the said United States Circuit Court of Appeals for the Ninth Circuit, may be reversed by this Honorable Court and that the judgment of the District Court of the United States for the Southern District of California, Central Division, be affirmed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper.

Dated: This 27th day of March, 1941.

EDWIN A. MESERVE,
of
MESERVE, MUMPER & HUGHES,
Solicitors for Petitioner.

DARIUS F. JOHNSON,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. .....

ARMATURE EXCHANGE INCORPORATED, a corporation, also known as THE ARMATURE EXCHANGE, a corporation, also known as THE ARMATURE EXCHANGE INCORPORATED, a corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered January 17, 1941.

The statute under which jurisdiction is invoked is section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. 347).

Petitioner urges that the Circuit Court of Appeals for the Ninth Circuit has decided an important question of Federal law which has not, but should be settled by this

Court, and has decided an important question of general law probably untenable and in conflict with the weight of authority; that this Honorable Court has jurisdiction of the matter by virtue of the above cited statute as interpreted by Rule 38, Subsection 5 (b), Revised Rules of the Supreme Court of the United States now in effect.

Opinions and Decree Below.

The opinion of the District Court [R. 11] is reported in 28 Fed. Supp. 10. The decree of the District Court was entered and recorded on the 16th day of June, 1939. [R. 25-26.] The opinion of the Circuit Court of Appeals for the Ninth Circuit [R. 122] was rendered and filed on the 17th day of January, 1941, and is reported in 116 Fed. (2d) 969. The decree of the United States Circuit Court of Appeals was filed and entered on the 17th day of January, 1941. [R. 130.] Petition of The Armature Exchange (appellee below) for rehearing was denied, on the 18th day of February, 1941. [R. 130.]

Statement of Facts.

The essential facts of the case are fully set forth in the accompanying petition for writ of certiorari and in the interest of brevity are not repeated here.

Specifications of Error.

1. The Circuit Court of Appeals erred in deciding that the operations of petitioner in rewinding burned out or damaged armatures constituted manufacturing or production of automobile parts or accessories within the purview of section 606 (c) of the Internal Revenue Act of 1932. [R. 122.]

2. The Circuit Court of Appeals erred in holding that Congress must be taken to have approved the administrative construction of Article 4, Regulations 46, approved June 18, 1932, and section 606 (c) of the Internal Revenue Act of 1932, by reason of the reenactment, without material change, of the statute taxing the manufacturing and production of automobile parts and accessories. [R. 128.]

3. The Circuit Court of Appeals erred in holding that the burned out armatures were discarded armatures and had lost their commercial value. [R. 127 and 129.]

4. The Circuit Court of Appeals erred in reversing the judgment of the District Court. [R. 129.]

ARGUMENT.

POINT I.

The Circuit Court of Appeals Erred in Deciding That the Operations of Petitioner in Rewinding Burned Out or Damaged Armatures Constituted Manufacturing or Production of Automobile Parts or Accessories Within the Purview of Section 606(c) of the Internal Revenue Act of 1932.

(a) MANUFACTURING OR PRODUCTION CONSISTS OF THE APPLICATION OF LABOR OR SKILL BY HAND OR MACHINERY SO THAT AS A RESULT THEREOF A NEW, DIFFERENT AND USEFUL ARTICLE OF COMMERCE IS PRODUCED.

In this case petitioner seeks a refund of manufacturer's excise taxes paid by it upon the sale of used, secondhand armatures which petitioner had repaired by rewinding. All of said armatures were secondhand armatures when acquired by petitioner. That is to say, all of the armatures which petitioner rewound had been manufactured by some one at some prior time and had actually been used as operating parts of automobile motors. By reason of such use, the wire coils on the armatures had become damaged or burned out.

The method of repairing is set forth in the record. [R. Vol. II, Joint Exhibit No. 1.] From the series of 21 pictures and the explanatory statement of each contained in said exhibit, it can readily be seen that there was no loss of identity or dismantling of the component parts of the armatures. In fact, uncontradicted testimony of the

plaintiff's witness, Alfred Prescott Daniels, was as follows [R. 75-76]:

> "The only part that was removed was the winding or the wire from the armature."
>
> * * * * * * * *
>
> "No, there was no identification removed."

Therefore, if the petitioner's rewinding process commenced with an armature and ended with an armature, it is obvious that nothing has been manufactured or produced. No new article of commerce has been produced by the process; no new thing has been brought into existence. When the rewinder commenced his work he had an armature. [R. Vol. II, Joint Exhibit No. 1, p. 1.] When his work was completed he still had an armature. [R. Vol. II, Joint Exhibit No. 1, p. 21.] It makes no difference how long it took him to do the work, or how many different pieces of machinery he employed during the process, or whether he worked alone in a small shop, or whether he worked with many other workmen in a large plant, or whether, after the process was completed, he immediately reinstalled the armature in the automobile from which it was taken, or whether he laid it upon a shelf and subsequently exchanged it for another used, secondhand armature. The question is, what did the rewinder do? Did he produce or manufacture a new article? Did he merely repair an article which someone had previously produced or manufactured? Manifestly, he has repaired an armature. His work commenced after the manufacture or production of that armature had long since been completed and the armature had actually seen service as an operating part of an automobile engine.

The principle which lies at the bottom of the foregoing proposition was recognized and stated by the Court in

Thurman, Collector v. Swisshelm, et al. (C. C. A. 7), 36 Fed. (2d) 350. In that case the taxpayer dealt in automobiles. They bought completed Ford automobiles from the Ford Company or its agents. They bought from the Ames Company automobile bodies so constructed that they would fit the Ford chassis. They would remove the Ford bodies from the automobiles and replace them with the Ames bodies. The question was whether the taxpayers by that process became the manufacturers or producers of automobiles so as to become liable for the manufacturer's excise tax on the automobiles. The court held that the mere exchange of one body for another upon a completed automobile, originally manufactured by some one other than the taxpayer, did not constitute manufacturing or production. And in holding, the court distinguished the case of *Klepper v. Carter* (C. C. A. 9), 286 Fed. 379, in which the tax had been sustained as to a taxpayer who bought a truck chassis from one company and a body from another company, and then assembled the parts "for the first time into a complete truck," and said l. c. 351:

> "The facts are different in that there no truck figures in the transaction until the parts had been assembled and connected; while here appellees bought the completed automobile, upon which the tax had already been paid."

The principle underlying the *Swisshelm* case is in nowise different than in the case at bar. Swisshelm commenced his process with an automobile, completely manufactured and tax paid by the manufacturer; the petitioner in this case commenced its work with an armature previously manufactured and tax paid by a manufacturer. When Swisshelm finished his process, he still had an automo-

bile—he had created nothing new; when petitioner in this case completed its rewinding process, it still had an armature—it had created nothing new.

The Treasury Department recognized the principle laid down by the *Swisshelm* case in sales tax rulings which were in effect during the taxable period herein involved, and in sales tax ruling 648, in part said:

> "The retreading of old tires by resurfacing or replacement of the actual tread down to the tread line, without altering the side walls or destroying the original identity of the tire, does not constitute the manufacture of a taxable article."

For the convenience of this court sales tax ruling 648 is set forth in full in the appendix to this brief. (Appendix page 57.)

Jobbers, garage men and even the owners of fleets of automotive equipment sometimes maintain their own rewinding service and rewind their own armatures and those of their customers. No reason is suggested, and it is submitted no reason exists, why rewinding an armature in such a case and under such circumstances is mere repair or reconditioning, whereas manufacture is said to occur when, as in petitioner's case, an armature is rewound in the same way, but is not immediately replaced in the motor from which it was removed, but is held on the shelf for a time and subsequently exchanged with a customer whose armature is burned out and who does not desire to wait while his own armature is rewound.

In *Anheuser-Busch Brewing Association v. United States*, 207 U. S. 556, the plaintiff sued to recover certain import duties which it had paid on corks designed for use in bottling beer. Under the act there involved petitioner

was required to prove as the basis of its refund or "drawback" that the corks involved were not manufactured corks, but merely materials imported to be used in the manufacture of corks in the United States. The evidence showed that the corks when imported into this country from Spain had already been cut by hand to the required size. It was further shown that in such condition, however, they were not suitable for use in bottling beer because they would not retain the gas in the bottle and because they would impart a cork taste to the beer, thereby making it unmarketable and unfit for use. After importation, however, the corks were subjected in the brewing company's plant to various processes and treatment consuming several days of time, during which the corks were treated, processed, sealed and coated so as to render them useful for the intended purpose. The court found that the process to which the corks were subject did not constitute manufacture; that the corks were manufactured before they were imported and that the brewing company was not entitled to its refund. In the opinion by Mr. Justice McKenna it is said, l. c. 559:

> "The corks in question were, after their importation, subject to a special treatment which, it is contended, caused them to be articles manufactured in the United States of 'imported materials' within the meaning of section 25. The Court of Claims decided against the contention and dismissed the petition. 41 Ct. Cl. 389.
>
> "The treatment to which the corks were subjected is detailed in Finding 3, inserted in the margin.
>
> "In opposition to the judgment of the Court of Claims counsel have submitted many definitions of 'manufacture,' both as a noun and a verb, which,

however applicable to the cases in which they were used, would be, we think, extended too far if made to cover the treatment detailed in Finding 3 or to the corks after the treatment. The words of the statute are indeed so familiar in use and meaning that they are confused by attempts at definition. Their first sense as used is fabrication or composition,—a new article is produced of which the imported material constitutes an ingredient or part. When we go further than this in explanation, we are involved in refinements and in impractical niceties. Manufacture implies a change, but every change in an article is the result of treatment, labor, and manipulation. But something more is necessary, as set forth and illustrated in *Hartranft v. Wiegmann,* 121 U. S. 609, 7 Sup. Ct. Rep. 1240. *There must be transformation; a new and different article must emerge, 'having a distinctive name, character or use.'* This cannot be said of the corks in question. A cork put through the claimant's process is still a cork." (Italics supplied.)

In the case of *American Fruit Growers, Inc. v. Brogdex Company,* 283 U. S. 1, the court was obliged to determine whether the process of impregnating the rind of an orange with borax, thereby rendering it resistant to mold and decay, constituted manufacture. In the opinion of Mr. Justice Reynolds, it is said, l. c. 11:

"Answering affirmatively the Circuit Court of Appeals said: 'The product claims define an article of manufacture, since the fruit is the result of a process which is defined and described and not a natural product. The product is a combination of the natural fruit and a boric compound carried by the rind or skin in an amount sufficient to render the fruit resistant

to decay. The complete article is not found in nature and is thus an article of manufacture. *Riter-Conley Mfg. Co. v. Aiken,* 121 C. C. A. 655, 203 Fed. 699 (35 Fed. (2d) 107).

"This position, we think, is not tenable.

" 'Manufacture,' as well defined by the Century Dictionary, is 'the production of an article for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand labor or by machinery.' Also, 'anything made for use from raw or prepared materials.'

"Addition of borax to the rind of natural fruit does not produce from the raw material an article for use which possesses a new or distinctive form, quality, or property. The added substance only protects the natural article against deterioration by inhibiting development of extraneous spores upon the rind. There is no change in the name, appearance, or general character of the fruit. It remains a fresh orange fit only for the same beneficial uses as theretofore."

In *Hughes v. City of Lexington,* 277 S. W. 981, the appellant was a corporation engaged in the business of making and selling ice cream. Nevertheless the City of Lexington contended that the corporation was not engaged in manufacturing within the meaning of the state statutes which exempt from city taxes machinery, material and supplies used in manufacturing. In the opinion by Clark, C. J., it is said, l. c. 982:

"The sense in which the term is here used, as well as the purpose intended to be accomplished by the act, is quite plain. Obviously, the term 'engaged in manu-

facturing' was not employed in any technical sense, but must be accorded its ordinary meaning as commonly understood. And, while incapable of exact definition, nevertheless it is true, as was stated in several of the above cases, that according to common understanding and generally speaking, manufacturing consists in the application of labor or skill by hand or machinery to material so that as a result thereof, a *new, different* and useful article of commerce is produced." (Italics supplied.)

The foregoing cases emphasize and reiterate the principle that whether a given process constitutes manufacturing depends upon whether the process results in the creation of a new thing. If that which emerges at the conclusion of the process is the same thing which entered the process at its beginning, notwithstanding some labor and some new materials have been expended upon it during the process—in other words, if the thing retains its identity during the course of the process and after it is completed—then no manufacturing or production has occurred. If the article before the process commenced was a cork and it emerged from the process still a cork, there has been no manufacture. By the same token, the principle as applied to the case at bar leads inevitably to the conclusion that since the armatures in question did not lose their identity during the rewinding process, but were armatures when they entered petitioner's plant and were still armatures when they left the plant, there was no manufacture.

(b) THE MERE REPAIR, RESTORATION OR RECONDITIONING OF AN ARTICLE DOES NOT CONSTITUTE MANUFACTURING OR PRODUCTION.

An essential distinction must be preserved between manufacture which, as above shown, results in the creation of a new article. and mere repair which results only in the restoration of partial injury but does not create a new article. When an article which consists of several component parts sustains wear or suffers injury to one of those parts, the plain economics of the situation dictate that the injured part, if possible, shall be replaced or repaired, rather than that the entire article shall be wastefully discarded.

The distinction between repair or restoration, on the one hand, and manufacture or construction, on the other hand, is often called in question and decided in patent cases.

Perhaps the leading case in this field is *Wilson v. Simpson,* 9 How. 109. In that case the owner of a patented planing machine had repaired or reconditioned his machine by placing therein certain new parts, particularly the knives or cutting tools which were the important operative agency of the machine or, as it is sometimes said, the ultimate effective tool Notwithstanding the fact that the cutting tools were the most vital and important part of the machine and did the very work for which the machine was designed, the court had no difficulty in finding that their replacement constituted only repair of the machine and not manufacture or production of a new machine so as to infringe the patent. In the opinion by Mr. Justice Wayne, it is said, l. c. 123:

> "But it does not follow, when one of the elements of the combination has become so much worn as to

be inoperative, or has been broken, that the machine no longer exists, for restoration to its original use, by the owner who has bought its use. When the wearing or injury is partial, then repair is restoration, and not reconstruction.

"Illustrations of this will occur to anyone, from the frequent repairs of many machines for agricultural purposes. Also from the repair or replacement of broken or worn-out parts of larger and more complex combinations for manufacturers.

"In either case, repairing partial injuries, whether they occur from accident or from wear and tear, is only refitting machine for use. And it is no more than that, though it shall be a replacement of an essential part of a combination. It is the use of the whole of that which a purchaser buys, when the patentee sells to him a machine; and when he repairs the damages which may be done to it, it is no more than the exercise of that right of care which everyone may use to give duration to that which he owns, or has a right to use as a whole."

In *Hess-Bright Mfg. Co. v. Bearing Co.*, 271 Fed. 350, the court considered a case involving the alleged infringement of a patent upon a ball bearing. The bearing consisted of a groove of a certain depth with balls exactly fitting it. The vendee of this patented bearing reground or smoothed up the groove, an operation which necessarily resulted in somewhat enlarging the groove. This necessitated installing larger balls to fit the enlarged groove. The question was whether or not the owners of the bearing had constructed a new bearing so as to infringe the patent or whether he had merely repaired his bearing. The court found that there was no manufacture

involved in the process and that the patent had not been infringed. In the opinion of Dickinson, district judge, it is said, l. c. 351:

> "Counsel for plaintiff does not, of course, formulate the claim of right as defendant states it. He does not deny to the vendee of plaintiff the right to repair. What he does deny is any right, by using plaintiff's bearing as a model, to make a new bearing from the raw material of the old one. It is obvious that all this is nothing more than opposing statements of the effect of what the defendant had done. The defendant calls it the repair of old bearings. The plaintiff calls it new construction or reconstruction. Omitting the name properly to be applied to what was done, the fact finding is made that what was done was the regrinding of the groove of the old bearings, and, when required, the substitution of new balls to fit the grooves enlarged by the regrinding.
>
> "The dividing line between repairs and a making over cannot be verbally located. What has been done can with more or less confidence be pronounced to be one or the other, but neither the one nor the other can be defined. The judgment pronounced must in consequence partake of the *ipse dixit* or rescript character. A further consequence is that the adjudged cases provide us with little for our guidance. With no thought of finding a better mode of expression for the clearly presented views of counsel for plaintiff, it may be premised that a feature of the patented bearing is the metallic pathway provided in the form of a groove, which calls for the use of balls of a certain size. The nicety of adjustment required can be most emphatically expressed by the statement that the unit of measurement employed is the ten-thousandth

part of an inch. This groove may, from use or abuse, be in need of being remade by regrinding. The lightest repolishing, almost, is such.

"The argument that this is not repair, but a new construction, may be thus expressed: A bearing with a groove of a certain depth, with balls exactly fitting it, is sold by the plaintiff to A. Another bearing, with a different groove, calling for the next larger size balls, is sold to B. The first vendee smooths up the groove in his bearing, thus adopting it to the next larger size of balls. By so doing he has not repaired the bearing sold to him, but out of the material in this old bearing he has made a new one, which is not his old bearing, but a different bearing of the B type. In other words, the old A bearing has lost its identity by destruction, and a new bearing, B, has been made. In a sense this is, of course, true; but it is only true in a sense. Identity is not lost by a mere change in size. The rule of which we are in search is a practical rule for the guidance of practical men in practical business. What the patentee sells is a concrete thing. It is a bearing. As long as it remains the bearing of the patent, it is what the patentee sold. The moment it becomes something else, the patentee is not concerned with it. The groove of the patent is still the groove of the patent, although enlarged. It no more loses its identity by enlargement than a river does by the change of the volume, due to the flow and ebb of the tide, or by the shoaling or deepening of its channel by the wash of its current.

"The balls are no part of the groove, but something used with it. There is no thought of denying the right of a vendee to repair balls. His right is not limited to any size of ball. The balls may be

replaced without thought of infringement of any patent right. To deny vendee the right to smooth up a groove is to deny him all right to make repairs to the patented features of what was sold to him. The right cannot be limited to the use of the same balls as before. The only limitation is that he may repair, but cannot make a new bearing out of the material of the old. What is the one and what the other facts of each case must determine. The line, as before observed, is most difficult to draw in words of description; it is by no means so difficult to draw in fact.

"In the instant case our fact finding is that what defendant has done is to make repairs, and that it has not infringed upon the patent rights of plaintiff. The name given to anything is not necessarily indicative of what the thing is. A fact upon which defendant lays much stress has some interest as a coincidence, but no other value. The fact referred to is that the plaintiff itself did what the defendant has done, and the department in charge of such work was called by plaintiff its 'Repair Department.' We attach as little importance to the distinction between repairing and selling second-hand bearings after they have been repaired."

In *Foglesong Machine Co. v. Randall Co.* (C. C. A. 6), 239 Fed. 893, the defendant, being the owner of a patented machine for the stuffing of horse collars, was accused of infringing the patent by making certain repairs upon the machine. The court found that certain parts of

the machine were perishable in that they were subject to greater wear than other parts. In that connection the court said, l. c. 895:

> "The question for decision is: Did the defendant repair or reconstruct the machine which it purchased from the Grand Rapids Company? In supplying a new hopper, stuffing rod nose, and disc, the defendant merely returned to use the injured or lost portions of the mechanism. This constitutes repairing, and not reconstruction."

At another point the court said, l. c. 896:

> "The machine was not so broken and worn out as to require replacement. The wear and injury were but partial. Under such circumstances, repair is not reconstruction, but restoration, that the mechanism may be kept up to the full performance of its duty."

In *Goodyear Shoe Machine Co. v. Jackson* (C. C. A. 1), 112 Fed. 146, it is said in the opinion by Colt, C. J., l. c. 151:

> "Where the patent is for a machine, which commonly embraces the combination of many constituent elements, the question of infringement by the purchaser will turn upon whether the machine is only partially worn out or partially destroyed, or is entirely worn out, and so beyond repair in a practical sense. In the case of a patent for a planing machine composed of many parts it was held that the replacement of the rotary knives, 'the effective ultimate tool' of the machine, was repair, and not reconstruction, *Wilson v. Simpson,* 9 How. 109."

A further statement of the principals involved, together with a citation of many cases, is found in *Miller Hatcheries v. Incubator Co.* (C. C. A. 8), 41 Fed. (2d) 619.

In *State v. J. J. Newman Lumber Co.* (Miss.), 59 So. 923, the distinction between manufacture and repair is clearly stated by the Supreme Court of Mississippi as follows, l. c. 926:

> "A reasonable definition may be given to 'manufacturing' (Century Dictionary) as the system of industry which produces manufactured articles, and to 'manufacture' as the production of articles for use from raw or prepared materials, by giving to these materials new forms, qualities, and properties, or combinations, whether by hand labor or machinery, used more especially of production in a large way by machinery, or many hands working co-operatively. 'Repair' is to make whole or restore an article or thing to its completeness. In the general knowledge of the affairs of business and life, it will hardly be difficult to class those persons who are engaged in such employment."

Applying the principles announced and reiterated in the foregoing cases to the facts of the case at bar, it is clear that the injury to the used, secondhand armatures which the petitioner acquired and rewound was but partial. Only the wire coils were injured or destroyed. They were not "entirely worn out, and so beyond repair in a practical sense" (*Goodyear Shoe Machinery Co. v. Jackson,* 112 Fed. 146, 151), is conclusively proved by the fact that petitioner did restore them to their former condition of usefulness by the simple expedient of minor

repair. The basic thing or part is the core consisting of the shaft, commutator and laminated core, which was identified by Mr. Daniels, a witness for the petitioner. [R. 80.]

> "The Court: Often you would build it on—what do you call the basic thing, the coil?
>
> "The Witness: The armature is the basic thing, and we would put new wires on it, and turn it."

This is the principle which underlies the decision of the Supreme Court in *Cadwalader v. Jessup & Moore,* 149 U. S. 350. In that case the Supreme Court was called upon to decide whether certain imports of old India rubber shoes were dutiable as crude India rubber or as shoes composed of India rubber. The shoes were so worn as to be beyond repair and for that reason they had ceased to be shoes and were valuable only for the rubber which they contained. It is said in the opinion by Mr. Justice Blatchford at page 354:

> "The uncontradicted testimony is to the effect that the only commercial use or value of the old India rubber shoes, or scrap rubber, or rubber scrap in question, is by reason of the India rubber contained therein, as a substitute for crude rubber; that the old shoes were of commercial use and value only by reason of the India rubber they contained, as a substitute for crude rubber, *and not by reason of any preparation or manufacture which they had undergone;* that they could not fairly be called 'articles composed of India rubber,' and as such dutiable at 25 per centum *ad valorem;* and that, although the shoes may have been originally manufactured articles

composed of India rubber, they had lost their commercial value as such articles, and substantially were merely the material called 'crude rubber.' They were not India rubber fabrics, or India rubber shoes, because they had lost substantially their commercial value as such." (Italics supplied.)

The petitioner herein compares the above case to the case at bar, stating that the India rubber shoes had lost their commercial value as such articles, and substantially were the material called "crude rubber." It is agreed that they were correct in reference to the shoes, because they were not imported as used shoes to be repaired, but only for their value as crude rubber. In the instant case the armatures were repaired to restore them to their former condition of usefulness. If the petitioner had converted the armatures into some other automobile part then there might be some color of right in the respondent's contention; in fact, this action would never have been instituted.

The respondent based practically its entire case upon the decision in the case of *Clawson & Bals v. Harrison*, 108 Fed. (2d) 991. In order to get a clear picture of this case it is necessary to refer to the findings of fact and conclusion of law as found by the trial court. This case is not published in the National Reporter System, but may be found in Commerce Clearing House, 1939 Standard Federal Tax Service, Vol. 4, paragraph 9219. For the convenience of this court the findings of fact and conclusions of law made and entered by the court are submitted in the appendix to this brief (App. p. 28).

Clawson & Bals had new connecting rod forgings made for them, which they machined and babbitted. During

part of the period covered by their suit, they removed all marks of identification from rods manufactured by General Motors Corporation and subsidiaries. They also rebabbitted used and secondhand connecting rods. At paragraph 10 of the findings of fact the trial court found:

> "Plaintiff kept but one stock with respect to each number and had but one outright price with respect to the rods, irrespective of whether they were produced from entirely new castings or from scrap, and regarded the articles made from scrap as equivalent to any similar products made entirely from virgin metal. The rods made from scrap were in competition with similar products made entirely of virgin metal and were just as serviceable. They were held out for sale and sold on the same basis and under the same warranties as the connecting rods produced from entirely virgin forgings. In other words, plaintiff made no distinction between such connecting rods in the numbering, cataloging, selling, billing, advertising, shipping, labeling, pricing, marketing, quality, warranty, guaranty or otherwise."

As stated before, Clawson & Bals dealt in three kinds of connecting rods; newly-manufactured ones, rebabbitted rods on which the identification marks had been removed and other rebabbitted rods. They at all times held themselves out as manufacturers, as in truth they were. As manufacturers they paid excise tax on all sales of rods, but did not include as part of the sale price the exchange value of the old rods received as part of the selling price. Later the Government assessed a total of $54,232.02, representing tax and interest on the additional selling price as represented by the value of the old rods received in exchange. Immediately Clawson & Bals objected on the ground that they were only rebabbitters of a part of the

rods sold by them and that the additional tax paid by them of $54,232.02 should be refunded as representing the tax on the sale of rebabbitted connecting rods.

It is submitted that the facts in the *Clawson & Bals* case are entirely different from the facts in the case at bar. Clawson & Bals did manufacture new connecting rod forgings from virgin metal, they removed identification marks from a part of the rods rebabbitted by them, they were manufacturers and held themselves out as such, whereas the petitioner herein never manufactured an armature, or held itself out as a manufacturer, never removed any identification marks from the armatures and in fact never did more than repair used and damaged armatures.

A man may drop his watch and break the main spring so that its usefulness as a timepiece is, for the time being, destroyed. But in such a case the owner does not throw his watch away and buy another. Instead, he takes it to a skilled mechanic who replaces the broken or damaged part and restores the watch to its former condition of usefulness. No one would argue in such a case that the jeweler had manufactured a watch. The admitted fact is that the owner took a watch to him. True, the watch was damaged and would not operate, but it was, nevertheless, a watch. After the jeweler had repaired the main spring, it was still a watch. It never lost its identity as a watch. Such is the process of repair or restoration as distinguished from the process of manufacture. The fact the man receives back his own watch after repair or for the purpose of saving time exchanges it for a second-hand watch already repaired which the jeweler may have in his stock for sale, would in no wise make the jeweler a manufacturer or producer of watches.

POINT II.

The Circuit Court of Appeals Erred in Holding That Congress Must be Taken to Have Approved the Administrative Construction of Article 4. Regulations 46, Approved June 18, 1932, and Section 606(c) of the Internal Revenue Act of 1932, by Reason of the Reenactment of the Statute Taxing the Manufacturing and Production of Automobile Parts and Accessories Without Material Change.

(a) Treasury Regulations Do Not Acquire the Force and Effect of Law Until They Have Been Recognized and Settled by Court Decree.

Treasury regulations are adopted after the enactment of laws by Congress in order to clarify and to set up administrative procedure. At the time Congress passed the Internal Revenue Act of 1932 there was no regulation in effect which would apply to that act, and Congress cannot be taken to have delegated to the Treasury Department any legislative prerogatives as would be true if the decision of the Circuit Court of Appeals is correct.

Certainly Congress cannot be considered to have recognized the force and effect of the administrative construction of section 606 (c) adopted by the Treasury Department, until those regulations have been given judicial approval by this Honorable Court. It is well established law that the Treasury Department has no authority to amend a congressional act or extend the meaning thereof by regulation, see *Koshland v. Helvering,* 298 U. S. 441, at 447, wherein the court states:

> "But where, as in this case, the provisions of the act are unambiguous, and its directions specific, there is no power to amend it by regulation. Congress

> having clearly and specifically declared that in taxing income arising from capital gain the cost of the asset disposed of shall be the measure of the income, the Secretary of the Treasury is without power by regulatory amendment to add a provision that income derived from the capital asset shall be used to reduce cost."

The statute in the case at bar is unambiguous and the great weight of authority as evidenced by the decisions of Federal and State jurisdictions cited and discussed under Point I of this brief, shows that the operations of petitioner herein constituted repair only, and petitioner must therefore be excluded from the effect of said act.

To apply the contention of the Circuit Court of Appeals as laid down by the opinion in the instant case would presuppose a presumption by Congress that Treasury Regulations would be adopted which would extend this act. There is such a doubt created that it has become necessary for this Honorable Court to decide the question so that a multiplicity of suits may be prevented and a just application of the law assured.

The courts have frequently been called upon to interpret taxing statutes. In doing so it has become recognized law that any doubt shall be resolved in favor of the taxpayer.

(b) TAXING STATUTE MUST BE STRICTLY CONSTRUED AND SHOULD BE SO CONSTRUED AS TO PRODUCE UNIFORMITY AND EQUALITY IN THEIR APPLICATION. THEIR PROVISIONS CANNOT BE EXTENDED BY IMPLICATION.

There was no dispute at the trial of this case to the methods employed by the petitioner in rewinding armatures. In fact the method was covered by a series of 21 pictures and an explanatory statement for each, which were introduced as a joint exhibit. [R. Vol. II, Joint Exhibit No. 1.]

The government produced no direct evidence whatever that the rewinding of armatures is a manufacturing process or that the rewinding of armatures constitutes the manufacture of armatures.

Being totally without any direct evidence that rewinding is a manufacturing process, the government apparently attempted to prove its case by the use of a syllogism which runs something like this: All large establishments employing many men, using many machines and turning out a large volume of work, doing business on a large scale and publishing catalogues in which their product is described, are manufacturing establishments; plaintiff has all these characteristics; therefore, plaintiff is a manufacturing establishment. The major premise of this syllogism is, of course, untrue, and the conclusion is, therefore, completely false. Size and extent and volume of business do not constitute the test of manufacture. It is common knowledge that there are many machine shops much larger than petitioner's which manufacture nothing, but are engaged only in repair work.

Much emphasis was also placed on the fact that the appellee was incorporated "to carry on the business of

manufacturing and assembling armatures * * * and to market them." [R. 106.] This corporation was organized in 1922 [R. 57], ten years before the enactment of the Revenue Act of 1932. The articles of incorporation were so broad that petitioner could do practically anything that an individual could do. [R. 106-109.] The test is not what the articles of incorporation recite, but what was actually done during the period involved.

If the taxing statute here involved is to be applied and administered by testing whether a company is a manufacturer or a repairman by determining whether it does business on a large scale or on a small scale, and whether it employs many men or few men, and whether its articles of incorporation authorize it to manufacture or not, then the administration of the taxing statute will result in the greatest inequality and lack of uniformity. The rewinder who sells several thousand armatures a month will be taxed because he is large and the rewinder who sells only a few armatures a month will not be taxed because he is small. The rewinder empowered to manufacture armatures will be taxed because of those powers, even though he is not exercising them.

The petitioner herein distributed printed catalogues, wherein were listed the armatures sold, showing the original manufacturer's name and parts number, in addition to appellee's code number. [R. 67-73.]

The mere fact that ownership of the armatures was vested in the petitioner does not affect its status as a repairer. There is nothing to prevent appellee from acquiring title to used armatures and repairing them and offering them for sale. Certainly there is no conflict here between the repairman being also the owner and vendor or only the repairman of the used armatures for others.

The true test, and the only test, is whether the rewinding process itself results in the creation of a new article, or whether it only accomplishes the restoration of an article already created. That is the test which can be applied to every rewinder and will result in absolute equality and uniformity of administration of the taxing statute.

In *City of Louisville v. Zinmeister* (Ky.), 222 S. W. 958, l. c. 959, the Supreme Court of Kentucky said:

> "In the recent case of *Lorrilard Co. v. Ross, Sheriff*, 183 Ky. 217, 209 S. W. 39, we held that the word 'manufacture' in the sense in which it is employed in the statutes quoted above, does not import the means or methods employed, or the nature or number of processes resorted to, or the size of the factory or the number of hands it employs, or the volume of machinery in use, but the result accomplished, whether the article is manufactured or not."

It is elementary that taxing statutes are to be construed strictly in favor of the taxpayer. This means that the tax must be based upon express statutory authority and cannot be imposed by implication. In *Hartranft v. Wiegmann*, 121 U. S. 609, it is said in the opinion by Mr. Justice Blatchford, at page 616:

> "We are of the opinion that the decision of the Circuit Court was correct. But, if the question were one of doubt, the doubt would be resolved in favor of the importer, 'as duties are never imposed on a citizen upon vague or doubtful interpretations.' *Powers v. Barney*, 5 Blatchf. 202; *United States v. Isham*, 84 U. S. 17 Wall. 496, 504; *Gurr v. Scudds*, 11 Exch. 190, 191; *Adams v. Bancroft*, 3 Sumn. 385."

In *Miller v. Standard Nut Margarine Co.,* 284 U. S. 498, it is stated in the opinion by Mr. Justice Butler, at page 508:

> "It is elementary that tax laws are to be interpreted liberally in favor of taxpayers and that words defining things to be taxed may not be extended beyond their clear import, doubts must be resolved against the government and in favor of taxpayers. *United States v. Merriam,* 263 U. S. 179, 188, 29 A. L. R. 1547, 44 S. Ct. 69; *Bowers v. New York & A. Literage Co.,* 273 U. S. 346, 350, 47 S. Ct. 398."

In *Erskine v. United States* (C. C. A. 9), 84 Fed. (2d) 690, 691, it is said:

> "Such revenue acts must be construed strictly in favor of the appellant sought to be charged as importer. He is 'entitled to the benefit of even a doubt.' Tariff Act 1897, 30 Stat. 151; *United States v. Riggs,* 203 U. S. 136, 1939, 27 S. Ct. 39, 40, 51 L. Ed. 127; *Hartranft v. Wiegmann,* 121 U. S. 609, 616, 7 S. Ct. 1240, 30 L. Ed. 1012; *Miller v. Standard Nut Margarine Co.,* 284 U. S. 498, 508, 52 S. Ct. 260, 76 L. Ed. 422."

In *Bankers Trust Co. v. Bowers* (C. C. A. 2), 295 Fed. 89, 96, it is said that the construction placed on a statute should avoid unjust consequences unless the act compels such a result. This is particularly true of a taxing statute where absolute uniformity and equality are to be preserved.

In *Alaska Consolidated Canneries v. Territory of Alaska* (C. C. A. 9), 16 Fed. (2d) 256, l. c. 258, it is said in the opinion by Rudkin, C. J.,:

> "Of course there is a presumption that laws, and especially tax laws, will have a prospective operation

> only; but there is a like presumption that they are intended to operate uniformly and equally upon all and in the end, the question is one of legislative intent."

The contention of the government that some distinction may be made predicated upon the fact that the petitioner is a large operator would seem to be specifically refuted by the case of *Spreckels Sugar Refining Co. v. McClain* (C. C. A. 3), 113 Fed. 244, opinion by Circuit Judge Dallas. In that case the statute imposed an excise tax on all gross receipts in excess of the sum of $250,000.00 per annum. A monthly return was required by the law, which did not specifically require anything but an annual payment of tax. The Spreckels Company filed a return for the first month, showing receipts in excess of the sum of $250,000.00, and it was contended that the law should be construed that the construction of the act contended for by the government was "so questionable as to render it inadmissible to impose a duty upon a citizen," citing the *Hartranft* case, and further held that such an inequality in the administration of the law could not be imposed upon the plaintiff simply because the returns were so large that its first monthly return exceeded $250,000.00. The court said in the opinion, l. c. 247:

> "We have already pointed out that it is not necessary to put an interpretation upon this section which might involve such inequality in its administration and, except by necessity, no such interpretation could be justified."

The opinion of the learned trial court in this case [R. 11-25] discloses that in every respect the principles announced in the foregoing authorities were closely adhered

to. After carefully reviewing the evidence which had been adduced at the trial the court stated [R. 24]:

> "If a person with mechanical skill were asked to rewind an armature, by one who paid him the value of his labor and materials, would the process be one of manufacturing? I do not think so. The fact that this company does this on a large scale does not alter the situation. In neither case are we dealing with a 'manufacturer' or 'producer.'"

On the question of the wording of the articles of incorporation, on which the appellant lays great emphasis, the trial court said [R. 105]:

> "Under these articles, they can sell everything but liquor. They can do billposting, and everything else. I don't know what good this will do."

Thus it can be seen that the court weighed the very points which are here urged by the respondent and specifically decided that large size of the plant, number of employees and authorization of the articles of incorporation would not constitute the test of the application of the statute.

It is a cardinal principle of tax law that any doubt shall be resolved against the taxing authority. To do otherwise in this action would be to work great hardship upon the petitioner and controvert all established law on that point.

Had Congress intended the tax herein involved to attach to the sale of repaired automobile parts such provision would have been put in the Internal Revenue Act of 1932. Failure to put such provision in that act shows clearly that it intended for the tax to attach to the sale of only newly-manufactured parts.

POINT III.

The Circuit Court of Appeals Erred in Holding That the Burned Out Armatures Were Discarded Armatures and Had Lost Their Commercial Value.

These armatures were not "junk," and had not been discarded by their former owners as is contended by the respondent. On the contrary, they had been carefully preserved and had been sent to this petitioner either directly or through jobbers so that they might be rewound or exchanged for other armatures of a similar type which had already been rewound.

Harry E. Seneker, testifying for the petitioner, when asked what percentage of the armatures were procured from jobbers, stated [R. 97]:

"A. Approximately 95 per cent."

If these armatures were so far worn out and so beyond repair that they had ceased to have any value over and above the melting pot value of the metal contained in them, why did plaintiff pay an average of from fifty cents to one dollar for them? If the court can draw upon its fund of common knowledge and take judicial knowledge of the fact that there is such a thing in the steel industry as scrap, then it must also know that steel scrap is regularly bought and sold as a commodity of commerce at a price of a few dollars per ton. The current price for scrap steel is now $11.50 per ton, slightly more than half cent per pound, which makes the junk value of an armature core about 5 cents.

Under the undisputed evidence in this case, it is conclusively proved and established that these armatures had a commercial value to the petitioner and to other con-

cerns engaged in the rewinding business in excess of their "junk value." It is obvious that the comparatively great commercial value of used armatures in excess of the melting pot value of the metals contained therein is due entirely to the fact that these armatures may be restored to their former condition of usefulness and mechanical efficiency by a process of repair.

Conclusion.

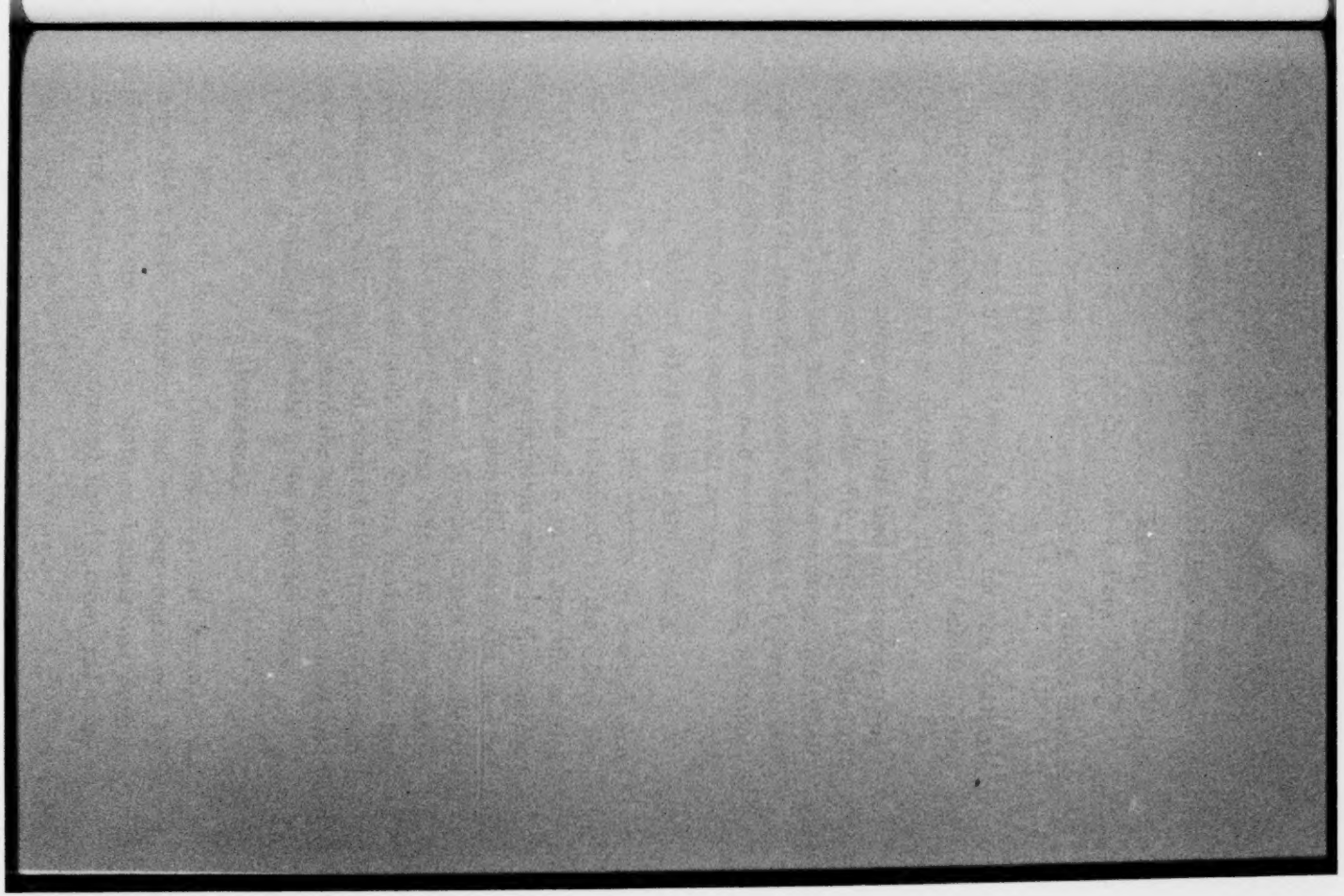
Petitioner respectfully submits the decision of the Circuit Court of Appeals for the Ninth Circuit holding petitioner liable for a tax on the sale of repaired burned out automobile generator armatures is an erroneous decision of an important question of Federal law which has not been but should be settled by this Honorable Court; that the decision of the Circuit Court of Appeals for the Ninth Circuit is of an important question of general law, untenable and in conflict with the weight of authority and it is respectfully urged that this petition be granted in order that this Honorable Court may pass upon the important question and reverse the decision of the Circuit Court of Appeals for the Ninth Circuit thereby relieving petitioner of a grievous injustice.

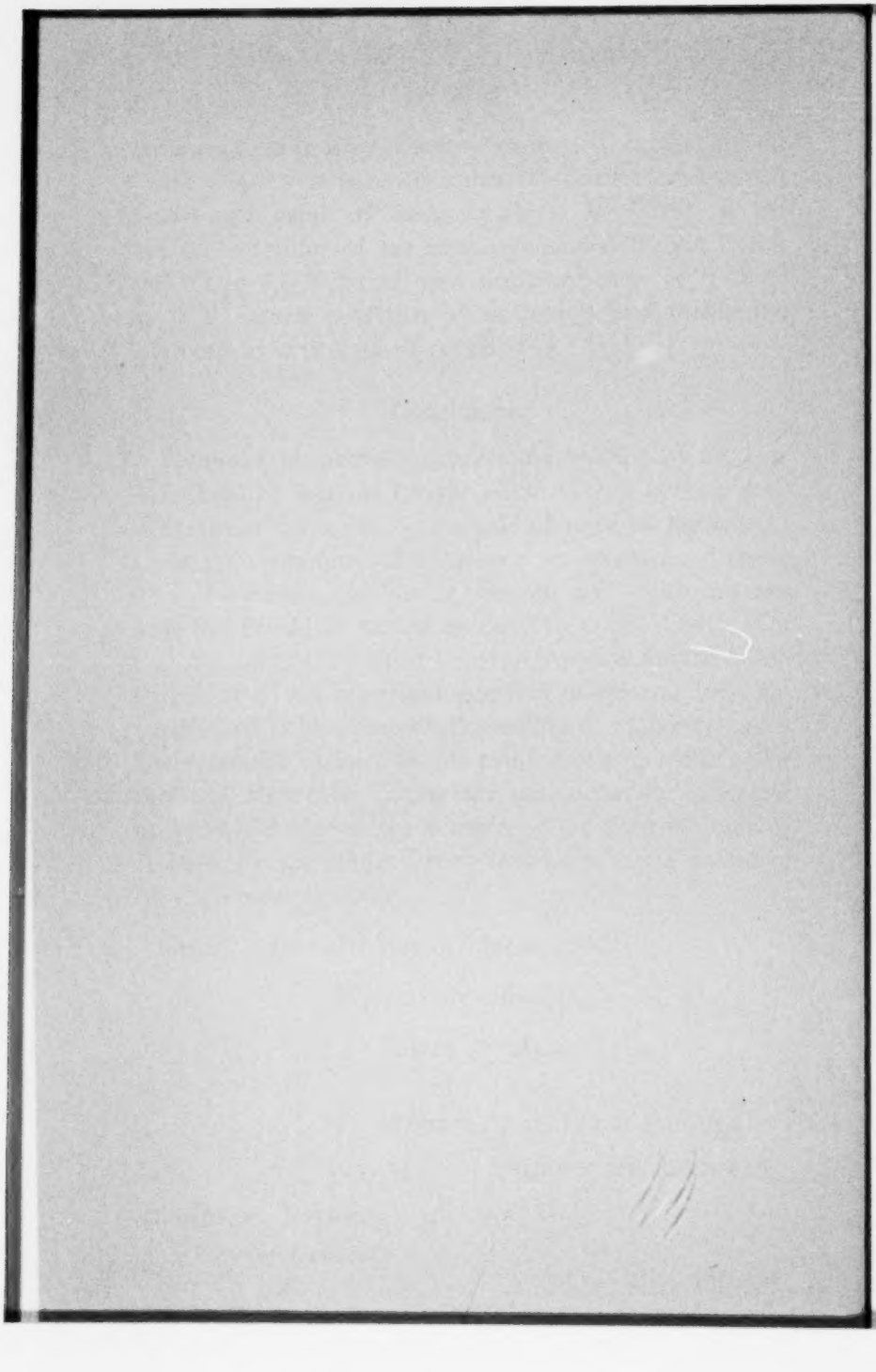
Dated: This 27th day of March, 1941.

Respectfully submitted,

EDWIN A. MESERVE,
of
MESERVE, MUMPER & HUGHES,
Solicitors for Petitioner.

DARIUS F. JOHNSON,
Of Counsel.





APPENDIX TO PETITIONER'S BRIEF.

(Reprinted from Commerce Clearing House 1936 Standard Federal Tax Service, Vol. 4, Para. 9492.)

Monteith Brothers Company, plaintiff, v. United States of America, defendant.

District Court of the United States for the Northern District of Indiana, South Bend Division. October Term, 1936. Judgment entered October 5, 1936.

Excise tax on automobile parts and accessories. Since not specifically mentioned under Sec. 606(c) of the 1932 Act, rewound, rebuilt, and repaired armatures, and rebuilt and repaired generators, and rebabbitted, repaired and rebuilt connecting rods are held not taxable as automobile parts and accessories under that section.

See: Reg. 46, Art. 41, at Para. 2614, Vol. 3.

SLICK, D. J.: Come now the parties by counsel, and this cause being at issue is submitted to the Court for trial without the intervention of a jury, and the parties having filed their written stipulation wherein they agreed that all of the allegations in plaintiff's complaint may be taken by the Court as true and proven, except the allegation wherein the plaintiff charges that it is not a manufacturer or producer and the Court having taken the admitted allegations of said complaint as true and proven and the Court having heard the argument of counsel and the Court being duly advised in the premises finds:

(FINDINGS)

1. Monteith Brothers Company, plaintiff herein, is a corporation duly organized and existing under and by virtue of the laws of the State of Indiana and during the times hereinafter mentioned had its office and prin-

cipal place of business in the City of Elkhart, State of Indiana, and within this judicial district.

2. Plaintiff made and filed its manufacturer's excise tax in compliance with the demand of the Collector of Internal Revenue of defendant under Paragraph C, Section 606, of the Revenue Act of 1932, for the sum of Five Hundred ($500) Dollars and because of said demand did pay to the United States Collector of Internal Revenue said sum of Five Hundred ($500) Dollars on the 27th day of September, 1934.

3. On the 15th day of November, 1934, plaintiff filed its claim for refund of said Five Hundred ($500) Dollars manufacturer's excise tax so paid to the Collector of Internal Revenue of the United States and asked for a refund and repayment to plaintiff of said sum of Five Hundred ($500) Dollars for the reason that no tax had accrued against the plaintiff under Section 606 of the Revenue Act of 1932; that said demand for refund was by the Collector of Internal Revenue of the United States denied and rejected on the 26th day of June, 1935. That said sum of Five Hundred ($500) Dollars so paid on said alleged claim of the defendant was paid because of the demand for payment by defendant under and pursuant to Section 606 of the Revenue Act of 1932, which tax was not assessable for the reason that plaintiff did not come within said Section 606 of said Revenue Act of 1932.

4. That for more than ten (10) years last past and next preceding the filing of this action plaintiff was engaged at Elkhart, Indiana, in the business of rewinding, rebuilding and repairing armatures, rebuilding and repairing generators, rebabbitting, repairing and rebuilding connecting rods for automobiles; that said rewound, rebuilt and repaired armatures, rebuilt and repaired gener-

ators, rebabbitted, repaired and rebuilt connecting rods so handled by the plaintiff were for many years preceding the passage of the Revenue Act of 1932 extensively advertised and were well known commercial commodities in the automobile industry.

5. That the plaintiff has not included any of said sum of Five Hundred ($500) Dollars for recovery of which this action is filed, it disposed of its said product described in said complaint and has not collected the same or any part thereof from any of plaintiff's customers, nor from any other source.

6. That said rewound, rebuilt and repaired armatures and rebuilt and repaired generators and rebabbitted, repaired and rebuilt connecting rods as described in plaintiff's complaint and on which said tax was assessed and paid did not, nor did any of the same come within the purview of Paragraph C, Section 606 of the Revenue Act of 1932 for the reason that none of said articles described in plaintiff's complaint and on which said taxes were assessed and paid are spark plugs, storage batteres, leaf springs, coils, timers or tire chains. That the levying of a tax upon the rewound, rebuilt and repaired armatures, rebuilt and repaired generators and rebabbitted, repaired and rebuilt connecting rods, or either of them, as set out in plaintiff's complaint is an unlawful assessment; and levying and collecting of such tax. That no tax under Section 606 of the Revenue Act of 1932 can be imposed upon the sale of rewound, rebuilt and repaired armatures, rebuilt and repaired generators and rebabbitted, rebuilt and repaired connecting rods, because the same do not come within the Revenue Act of 1932.

7. That on the 21st day of July, 1934, the Collector of Internal Revenue for the defendant, The United States

of America, notified plaintiff in writing that the Internal Revenue Department of defendant, had pursuant to Paragraph C, Section 606 of the United States Revenue Act of 1932 assessed a tax against plaintiff in the sum of Eight Thousand Six Hundred Twenty-two and 1/100 ($8,622.01) Doliars as a manufacturer's excise tax claimed by the defendant covering the period from June 21, 1932, down to and including March 1, 1934, together with interest thereon in the sum of One Thousand Seventy-one and 93/100 ($1,071.93) Dollars, making a total tax and interest claimed by the defendant for said period from June 21, 1932 to March 1, 1934 of Nine Thousand Six Hundred Ninety-three and 94/100 ($9,693.94) Dollars and at said time the Internal Revenue Department of the defendant demanded payment of said sum of money. The Court further finds that in pursuance of such notice and demand of the defendant the plaintiff herein has paid to the Collector of Internal Revenue of the defendant for the use and benefit of the defendant the sum of Six Thousand Five Hundred Sixty-four and 64/100 ($6,564.64) Dollars:

8. That said taxes so paid by the plaintiff to the defendant as in its complaint set out were paid upon an illegal assessment and that said sum of Five Hundred ($500) Dollars so paid by plaintiff to the Internal Revenue Collector for the defendant on September 27, 1934, should be paid by the defendant to the plaintiff.

It is therefore considered, adjudged and decreed by the Court that plaintiff have and recover of and from the defendant the sum of Five Hundred ($500) Dollars, together with its costs and charges paid, laid out and expended, to which judgment of the Court the defendant, United States of America, at the time duly excepted.

(Reprinted from Commerce Clearing House, 1937 Standard Federal Tax Service, Vol. 4, Para. 9421)

Hempy-Cooper Manufacturing Company, a corporation, Plaintiff v. United States of America, Defendant.

District Court of the United States for the Western District of Missouri, Western Division. No. 9654. May 6, 1937.

Excise Tax on automobile parts and accessories.—Upon the facts, taxpayer is held to have been engaged in the repair of connecting rods and not the manufacture thereof, so that it was not taxable on their sale.

See Reg. 46, Art. 41 at 373 CCH Para. 2614.175.

Messrs. Delos C. Johns and W. B. Cozad, of the firm of Morrison, Nugent, Wylder and Berger, attorneys for plaintiff. Mr. Thomas A. Costolow, Assistant United States District Attorney, for defendant.

Before MERRILL E. OTIS, District Judge.

(QUESTION)

THE COURT: The question which this case presents is essentially a question of fact. The plaintiff sold automobile conencting rods. The tax which was imposed, a refund of which the plaintiff seeks in this case, was imposed upon the theory that the plaintiff manufactured the connecting rods which it sold. If it did manufacture them, it was properly taxed. It did no more than sell connecting rods which it had not manufactured but had only repaired, it was improperly taxed. The question then is, was that which the plaintiff did the manufacture of connecting rods or only the repair of connecting rods?

To my mind this question of fact seems most simple and most easy to answer. Perhaps its apparent simplicity covers up greater difficulties than I observe.

(Repair v. Manufacture)

Learned counsel for the defendant concedes that if an individual were to take a connecting rod from his automobile, part of which was so worn that it was no longer serviceable until it was repaired, that if the person in the shop to which he took this connecting rod did exactly what the plaintiff did with the connecting rods on which the plaintiff worked, learned counsel for the defendant concedes that would be no more than a repair of the connecting rod, and that if that was the business in which the plaintiff was engaged, it was not subject to this tax that was imposed in this case. I think counsel for the defendant is right in saying that what would have been done in that situation by the shop owner was only a repair of the connecting rod which had been brought to him. There can be no argument about that. That is too plain for argument.

The connecting rod is the same connecting rod after repairing is done as it was before. It has not lost its identity. Whether a given operation is manufacture or repair of something that already has been manufactured, does not depend upon what is done with the thing after it has been repaired or after it has been worked upon. It depends upon what has been done. If it is merely a repair operation, if it is handed back to some other person who has brought it for the purpose of having it repaired, it is still nothing but a repair operation if, after the work has been done, it is laid upon the shelf and sold the next day or the next week or the next year. In neither case is the identity of the thing lost.

(IDENTITY NOT LOST)

It seems to me that counsel for the defendant, as I indicated when he was arguing the matter, has confused a conception of a change of identity with a loss of marks of identification. If one takes a connecting rod and throws it into a pile of connecting rods in which there are 10,000 others, the mere fact that he can not again pick out that identical connecting rod which he threw into the pile of connecting rods because it has no marks upon it by which it can be identified, does not mean that its identity has been lost. Its identity has not been lost; it is still the same connecting rod that it was when it was thrown into the pile of connecting rods. That is true as to each of the connecting rods upon which the plaintiff did some work. Each of them was a connecting rod before the work was begun, and after the work, which made the connecting rod again useful and serviceable, was finished—it was the same connecting rod that it was before. Its identity had not been lost and had not been changed.

(CONCLUSION)

I am not able to reach any other conclusion than that all the plaintiff did was the repair of connecting rods and not the manufacture of connecting rods.

I have read through the requested findings of fact and conclusions of law. They follow the stipulation of facts, with certain additional findings that the evidence here presented today supports. The conclusions of law requested are those which I have suggested in this short oral opinion. The requested findings of fact and conclusions of law are adopted by the Court. To each of the conclusions of law the defendant is allowed an exception.

(Which said findings of fact and conclusions of law so adopted by the Court are in words and figures as follows:)

FINDINGS OF FACT

1. The plaintiff, Hempy-Cooper Manufacturing Company, is, and at all times involved in this suit was, a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, with its principal office and place of business in Kansas City, Jackson County, Missouri.

2. Prior to the 25th day of February, 1936, the defendant, acting by and through the Bureau of Internal Revenue of the Treasury Department and the Collector of Internal Revenue for the 6th District of Missouri, determined that there were due from the plaintiff, pursuant to the provisions of paragraph (c) of Section 606 of the Revenue Act of 1932, certain excise taxes upon the sale by plaintiff of certain automobile parts or accessories, to-wit, connecting rods in the sum of $1,030.87; and pursuant to such determination the defendant assessed said taxes, or caused the same to be assessed, against the plaintiff, and the Collector of Internal Revenue for the 6th District of Missouri made demand upon plaintiff for the payment of said taxes, together with penalty and interest thereon in the sum of $190.78, making a total assessment of $1,221.65. The plaintiff, pursuant to said assessment and demand, paid to said Collector of Internal Revenue for the 6th District of Missouri, the aforesaid sum of $1,221.65, on the 25th day of February, 1936.

3. Thereafter, and prior to the 20th day of June, 1936, the defendant acting by and through the Bureau of Internal Revenue of the Treasury Department and the Col-

lector of Internal Revenue for the 6th District of Missouri, determined that there were due from the plaintiff, pursuant to the provisions of paragraph (c) of Section 606 of the Revenue Act of 1932, certain excise taxes upon the sale by plaintiff of certain automobile parts or accessories, to-wit, connecting rods, in the sum of $360.07; and pursuant to such determination the defendant assessed said taxes, or caused the same to be assessed, against the plaintiff, and the Collector of Internal Revenue for the 6th District of Missouri made demand upon plaintiff for the payment of said taxes, together with penalty and interest thereon in the sum of $36.87, making a total assessment of $396.94. The plaintiff, pursuant to said assessment and demand, paid to said Collector of Internal Revenue for the 6th District of Missouri the aforesaid sum of $396.94, on the 20th day of June, 1936.

4. The excise taxes so assessed against and collected from, the plaintiff, as set forth in the preceding paragraphs numbered 2 and 3 hereof, were in respect of sales of certain automobile parts or accessories, to-wit, connecting rods, made by plaintiff during the period beginning with the month of June, 1932, and ending with the month of March, 1936.

5. The Collector of Internal Revenue for the 6th District of Missouri paid and remitted to the defendant said excise taxes and penalty and interest thereon so assessed against and collected from, the plaintiff, as aforesaid, and the defendant received and still retains the same.

6. On the 20th day of July, 1936, the plaintiff filed with the Collector of Internal Revenue for the 6th District of Missouri its claim for refund of the aforesaid excise taxes and penalty and interest thereon, assessed against, and collected from the plaintiff as hereinbefore

set forth, in the aggregate amount of $1,618.59. Said claim was made and duly filed upon the official form prescribed therefor by the Treasury Department of the United States and was so filed within four years after the date of payment of said taxes, and said claim set forth the reasons for, and the grounds supporting, the refund of said taxes.

7. Thereafter, and on the 30th day of October, 1936, the Hon Guy T. Helvering, Commissioner of Internal Revenue of the United States, acting by and through the Hon. D. S. Bliss, Deputy Commissioner of Internal Revenue, rejected and disallowed said claim for refund, and notified the plaintiff of such rejection and disallowance by letter signed by said Deputy Commissioner, dated the 30th day of October, 1936, and sent to plaintiff by registered mail.

8. The plaintiff did not include the aforesaid excise taxes in the price of the articles with respect to which said taxes were imposed; and plaintiff did not collect the amount of said taxes, or any part thereof, from the vendee or vendees of the articles in respect of which said taxes were imposed. The burden of said taxes was borne solely and exclusively by the plaintiff, and the burden of none of said taxes was passed on by the plaintiff to its customers or vendees.

9. All of the aforesaid excise taxes were assessed and imposed in respect of sales by plaintiff of rebabbitted connecting rods. All of said connecting rods were originally manufactured by persons, firms or corporations other than plaintiff and before their acquisition by plaintiff had been used as operating parts of automobile motors, and by reason of such use the babbit metal bearings constituting parts of said rods were worn, chipped, roughened and otherwise impaired.

10. Plaintiff imported none of said connecting rods in respect of which said excise taxes were assessed, but obtained all thereof from sources within the United States. At no time has plaintiff imported, nor does it now import, any automobile parts or accessories whatsoever.

11. The rebabbitting process to which the above mentioned used and second-hand connecting rods were subjected in plaintiff's shop consisted of melting and removing therefrom the old, worn, babbit metal bearings and of casting therein new babbit metal bearings and grinding, polishing and grooving the same so as to make said rods again suitable for use as operating parts of automobile motors.

12. The babbitt metal bearings contained in the connecting rods involved in this suit were of inconsequential size and bulk compared with the total size and bulk of the connecting rods.

13. The connecting rods which were rebabbitted by plaintiff, and in respect of which the excise taxes involved in this suit were imposed, did not lose their identity as connecting rods during, or as a result of, the rebabbitting process in plaintiff's shop.

14. None of the identifying symbols, trade-marks, numbers or other identifying data appearing on said connecting rods were removed, marred or obliterated during, or as a result of, the rebabbitting process in plaintiff's shop, but on the contrary, all such identifying numbers and data were left intact.

15. A rebabbitted connecting rod is a second-hand connecting rod; and all of the connecting rods which were rebabbitted by plaintiff, and in respect of which the

taxes involved in this case were imposed, were second-hand connecting rods when sold by plaintiff after the same were rebabbitted.

16. The arrangement under which plaintiff kept on hand and in stock a supply of rebabbitted connecting rods of various kinds and makes was a matter of convenience to the plaintiff and its customers so that the customers of plaintiff, by exchanging their rods, used rods for rebabbitted rods and paying a consideration in cash for the rebabbitting, could obtain prompt delivery of rebabbitted rods without waiting for the actual rebabbitting process to be completed upon the customers' own rods.

17. Rebabbitted connecting rods were widely known and used in the automobile industry for many years prior to the enactment of the Revenue Act of 1932, including Section 606 thereof, and there were many persons, firms and corporations in various parts of the United States engaged in the business of rebabbitting connecting rods at the time of enactment of the Revenue Act of 1932, and for many years prior thereto.

18. The rebabbitting process performed by plaintiff upon the connecting rods in respect of which the excise taxes involved in this case were imposed constituted the repair, rehabilitation or reconditioning of used and second-hand connecting rods, and did not constitute the manufacture or production of connecting rods.

19. The plaintiff at no time manufactured, produced, or imported any automobile parts or accessories whatsoever.

20. The sales of rebabbitted connecting rods in respect of which the excise taxes involved in this case were imposed did not constitute the sales of automobile parts or accessories by the manufacturer, producer or importer.

CONCLUSIONS OF LAW.

1. The plaintiff has complied with all statutory conditions constituting conditions precedent to the institution and maintenance of this suit.

2. The plaintiff is not, and was not during the times involved in this suit, the manufacturer, producer or importer of automobile connecting rods or of any automobile parts or accessories whatsoever within the meaning of Section 606 of the Revenue Act of 1932.

3. The tax imposed by Section 606 (c) of the Revenue Act of 1932 applies only to sales of automobile parts or accessories when sold by the manufacturer, producer or importer.

4. The excise tax imposed by Section 606 (c) of the Revenue Act of 1932 does not apply to sales of rebabbitted automobile connecting rods by one who acquires such rods second-hand and rebabbits the same, and who neither manufactures, produces nor imports any other automobile parts or accessories.

5. In holding and determining that the tax imposed by Section 606 (c) of the Revenue Act of 1932 applied to sales of rebabbitted connecting rods by plaintiff during the period beginning with the month of June, 1932, and ending with the month of March, 1936, the Commissioner of Internal Revenue has exceeded the authority granted him under the Internal Revenue Act of 1932.

6. Under the evidence and the law the plaintiff is entitled to judgment against defendant in the sum of $1,618.59.

7. The plaintiff is not entitled to recover interest on said sum of $1,618.59.

Judgment for the plaintiff, the formal judgment entry may be submitted for approval and entry.

(Reprinted from Commerce Clearing House, 1938 Standard Federal Tax Service. Vol. 4 ¶9530.)

A. P. Bardet and E. Bardet, co-partners, Doing Business as the Pioneer Motor Bearing Co., Plaintiffs, v. United States of America, Defendant.

Southern Division of the District Court of the United States for the Northern District of California. No. 20364-L. Decided May 18, 1938.

Excise tax on automobile parts.—The excise tax imposed by Section 606 (c) of the 1932 Act does not apply to sales of rebabbitted automobile connecting rods by one who acquires such rods second-hand and rebabbits the same, and who neither manufactures, produces, nor imports any other automobile parts or accessories.

See Reg. 46, Art. 41 at 393 CCH ¶2614.176.

LOUDERBACK, J.: The above entitled cause came on regularly for trial before the above entitled Court, Honorable Harold Louderback presiding therein, sitting without a jury.

Plaintiffs appeared in person and by their attorneys, A. E. Graupner and Theodore L. Breslaure, and the defendant appeared by its attorney, Frank J. Hennessy, United States Attorney, being represented by Esther B. Phillips, Deputy United States Attorney.

Witnesses were sworn and testimony given at the said hearing, and the Court being fully advised in the facts and the law, makes its Findings of Fact as follows:

FINDING OF FACT.

Finds that all the allegations of plaintiff's complaint are true:

Finds that all the allegations of paragraph I and all the allegations of paragraph III except the sentence beginning on line 28 of page 2 of defendant's Answer, and all the allegations in paragraphs V and VI of defendant's Answer are untrue; and more particularly,

The Court finds that the plaintiffs, A. P. Bardet and E. Bardet, were and are at all the times involved in this action, co-partners.

Prior to the 14th day of April, 1937, the defendant, acting by and through the Bureau of Internal Revenue of the Treasury Department and the Collector of Internal Revenue for the First District of California, determined that there was due from the plaintiffs, pursuant to the provisions of Paragraph C of Section 606 of the Revenue Act of 1932, certain excise taxes upon the sale by plaintiffs of certain automobile parts or accessories, to-wit: connecting rods, in the sum of One Thousand Nine Hundred Twenty-nine and 61/100 Dollars ($1929.61); and pursuant to such determination, defendant assessed said taxes, or caused the same to be assessed against the plaintiffs; and the Collector of Internal Revenue for the First District of California made demand upon plaintiffs for the payment of said taxes together with a penalty in the sum of Ninety-six and 48/100 Dollars ($96.48) and interest in the sum of Forty-four and 61/100 Dollars ($44.61), the total demand aggregating the sum of Two Thousand Seventy and 70/100 Dollars ($2070.70); plaintiffs, pursuant to said assessment and demand, paid to said Collector of Internal Revenue for the First District

of California the aforesaid sum of Two Thousand Seventy and 70/100 Dollars ($2070.70) on the 14th day of April, 1937.

The excise taxes so assessed against, and collected from the plaintiffs, as set forth in the preceding paragraphs, were in respect of sales of certain automobile parts or accessories, to-wit, connecting rods, made by plaintiffs during the period from June, 1932 to July, 1936.

The Collector of Internal Revenue for the First District of California paid and remitted to the defendant said excise taxes and penalty and interest thereon so assessed against, and collected from the plaintiffs as aforesaid, and the defendant received and still retains the same.

On the 7th day of May, 1937, plaintiffs filed with the Collector of Internal Revenue for the First District of California, their claim for refund of the aforesaid excise taxes and penalty and interest thereon, assessed against, and collected from the plaintiffs as hereinbefore set forth, in the aggregate amount of Two Thousand Seventy and 70/100 Dollars ($2070.70). Said claim was made and duly filed upon the official form prescribed therefor by the Treasury Department of the United States and was so filed within four years after the date of payment of said taxes, and said claim set forth the reasons for, and the grounds supporting, the refund of said taxes.

Thereafter, and on or about the 23rd day of October, 1937, the Hon. Guy T. Helvering, Commissioner of Internal Revenue of the United States, acting by and through the Hon. D. S. Bliss, Deputy Commissioner of Internal Revenue, rejected and disallowed said claim for refund, and notified the plaintiffs of such rejection and disallowance by letter signed by said Deputy Commissioner, dated

the 23rd day of October, 1937, and which was received by the plaintiffs on or about the 27th day of October, 1937.

The plaintiffs did not include the aforesaid excise taxes in the price of the articles with respect to which said taxes were imposed; and plaintiffs did not collect the amount of said taxes, or any part thereof, from the vendee or vendees of the articles in respect of which said taxes were imposed. The burden of said taxes was borne solely and exclusively by the plaintiffs and the burden of none of said taxes was passed on by the plaintiff to its customers or vendees.

All of the aforesaid excise taxes were assessed and imposed in respect of sales by plaintiffs of rebabbitted connecting rods. All of said connecting rods were originally manufactured by persons, firms or corporations other than plaintiffs and before their acquisition by plaintiffs had been used as operating parts of automobile motors, and by reason of such use the babbitt metal bearings constituting parts of said rods were worn, chipped, roughened and otherwise impaired.

Plaintiffs imported none of said connecting rods in respect of which said excise taxes were assessed, but obtained all thereof from sources within the United States. At no time have plaintiffs imported, nor do they now import, any automobile parts or accessories whatsoever.

The rebabbitting process to which the above mentioned used and second-hand connecting rods were subjected in plaintiffs' shop consisted of melting and removing therefrom the old, worn, babbitt metal bearings and of casting therein new babbitt metal bearings and grinding, polishing and grooving the same so as to make said rods again suitable for use as operating parts of automobile motors.

The babbitt metal bearings contained in the connecting rods involved in this suit were of inconsequential size and bulk compared with the total size and bulk of the connecting rods.

The connecting rods which were rebabbitted by plaintiffs, and in respect of which the excise taxes involved in this suit were imposed, did not lose their identity as connecting rods during, or as a result of, the rebabbitting process in plaintiffs' shop.

None of the identifying symbols, trade-marks, numbers or other identifying data appearing on said connecting rods was moved, marred or obliterated during, or as a result of, the rebabbitting process in plaintiffs' shop, but on the contrary, all such identifying numbers and data were left intact.

A rebabbitted connecting rod is a second-hand connecting rod; and all of the connecting rods which were rebabbitted by plaintiff, and in respect of which the taxes involved in this case were imposed, were second-hand connecting rods when sold by plaintiffs after the same were rebabbitted.

The arrangement under which plaintiffs kept on hand and in stock a supply of rebabbitted connecting rods of various kinds and makes was a matter of convenience to the plaintiffs and their customers so that the customers of plaintiffs, by exchanging their old, used rods for rebabbitted rods and paying a consideration in cash for the rebabbitting, could obtain prompt delivery of rebabbitted rods without waiting for the actual rebabbitting process to be completed upon the customers' own rods.

Rebabbitted connecting rods were widely known and used in the automobile industry for many years prior to the enactment of the Revenue Act of 1932, including Section 606 thereof, and there were many persons, firms and corporations in various parts of the United States engaged in the business of rebabbitting connecting rods at the time of enactment of the Revenue Act of 1932, and for many years prior thereto.

The rebabbitting process performed by plaintiffs upon the connecting rods in respect of which the excise taxes involved in this case were imposed constituted the repair, rehabilitation or reconditioning of used and second-hand connecting rods, and did not constitute the manufacture or production of connecting rods.

The plaintiff at no time manufactured, produced, or imported any automobile parts or accessories whatsoever

The sales of rebabbitted connecting rods in respect of which the excise taxes involved in this case were imposed did not constitute the sales of automobile parts or accessories by the manufacturer, producer or importer.

CONCLUSIONS OF LAW.

From the foregoing Findings of Fact, the Court makes its Conclusions of Law as follows:

The plaintiffs have complied with all statutory conditions constituting conditions precedent to the institution and maintenance of this suit.

The plaintiffs are not, and were not during the times involved in this suit, the manufacturer, producer or im-

porter of automobile connecting rods or of any automobile parts or accessories whatsoever within the meaning of Section 606 of the Revenue Act of 1932.

The tax imposed by Section 606 (c) of the Revenue Act of 1932 applies only to sales of automobile parts or accessories when sold by the manufacturer, producer or importer.

(Tax Not Applicable)

The excise tax imposed by Section 606 (c) of the Revenue Act of 1932 does not apply to sales of rebabbitted automobile connecting rods by one who acquires such rods second-hand and rebabbits the same, and who neither manufactures, produces nor imports any other automobile parts or accessories.

In holding and determining that the tax imposed by Section 606 (c) of the Revenue Act of 1932 applied to sales of rebabbitted connecting rods by plaintiffs during the period from June, 1932, to July, 1936, the Commissioner of Internal Revenue has exceeded the authority granted him under the Internal Revenue Act of 1932.

Under the evidence and the law the plaintiffs are entitled to judgment against defendant in the sum of Two Thousand Seventy and 70/100 Dollars ($2070.70) together with interest thereon from the 14th day of April, 1937, at the rate of six per cent (6%) per annum.

Let judgment be entered in accordance with the above Findings and Conclusions.

(Reprinted from Commerce Clearing House, 1939 Standard Federal Tax Service, Vol. 4, ¶9259)

Leo G. Becker and Fred Florence, doing business as the Becker-Florence Electric Company, Plaintiff, v. United States of America, Defendant.

District Court of the United States for the Western Division, Western District of Missouri. No. 9859. Decided December 27, 1938.

Excise tax on auto parts: Reconditioned generators and armatures.—Excise tax on sales by the manufacturer of automobile parts and accessories is not incurred where petitioners acquired used generators and armatures from automobile owners or from garages and repair shops, reconditioned them and sold them to automobile owners and repair shops, keeping a stock of them on hand so that the car owner would not be delayed while his generator was being repaired.

See Reg. 46, Art. 41 at 393 CCH ¶2614.023.

L. V. Copley, 29 Dierks Bldg., Kansas City, Mo., for the plaintiff. Thomas A. Costolow, Assistant U. S. Attorney, James W. Morris, Assistant Attorney General, Federal Bldg., Kansas City, Mo., for the defendant.

MEMORANDUM OPINION

REEVES, D. J.: This is a suit for refund of taxes paid to the United States Collector of Internal Revenue and remitted by him to the treasury of the government.

The taxes were imposed for a period extending between June, 1932 and May, 1935. The government authorities deemed the imposition of the tax as proper under paragraph (c) of Section 606 of the Revenue Act of 1932. Applicable portions of the section are as follows:

There is hereby imposed upon the following articles sold by the manufacturer, producer, * * * a tax equivalent to the following percentages of the price, for which so sold * * * (c) parts or accessories * * * for any of the articles enumerated in subsection (a) or (b), 2 per centum.

(WHO IS A MANUFACTURER?)

It was the contention of the government that the plaintiffs were the manufacturers and producers of generators and armatures for use in automobiles and being accessories within the purview of the statute.

On the other hand it is contended by the plaintiffs that the generators and armatures sold by it were merely reconditioned or repaired generators and armatures acquired by it either from automobile owners or from garage owners and repair shops where such generators and armatures had been abandoned because defective from wear and tear in use. The plaintiffs say that such generators and armatures became and were second-hand accessories. It was the evidence that the plaintiffs not only repaired generators and armatures for automobile owners, but that the principal part of their business was the acquisition of worn and defective generators and armatures, and the sale thereof, after having been reconditioned and repaired, to automobile owners and garages. It was a convenience, according to the testimony, to have a generator and an armature at hand to replace a defective or useless one so that the car owner would not be delayed while his generator was being repaired. As aptly stated by counsel, the sole question for decision is whether the plaintiffs should be classed as manufacturers and producers of such generators and armatures so as to justify the imposition of the tax.

Other facts will be stated in the course of this memorandum opinion.

1. As a postulate or premise to a proper decision of the case it should be kept in mind that the language of the statute should not be extended by interpretation beyond its clear import, and that the burdens of a tax should not be increased by implication or inference from the provisions of the statute. Bankers Trust Co. v. Frank K. Bowers, 295 F. 89 (1 USTC ¶87).

2. The Congress, in seeking to provide for an equitable and just application of the tax, specifically provided that, in cases where the manufacturer of automobile accessories sold its product to the manufacturer of automobiles to be used as accessories thereon, the tax was levied upon the vendee and not upon the manufacturer. And for the purpose of the section, "the vendee shall be considered the manufacturer or producer of the parts or accessories so resold."

The statute did not provide a special meaning for the words "manufacturer" and "producer." It is obvious from the provisions just mentioned that it was the object of the Congress to use the words "manufacturer" and "producer" in their recognized and ordinarily accepted meaning. One is confirmed in this conviction by the fact that the Congress, in imposing a tax on other articles of manufacture, specifically took the word "manufacture" out of the usual significance of the word and gave it a special and an unusual meaning. For instance, by Section 710, Title 26, USCA, a manufacturer of tobacco is defined to be:

Every person whose business it is to manufacture tobacco or snuff for himself, or who employs others to manufacture tobacco or snuff, whether such manufacture

be by cutting, pressing, grinding, crushing, or rubbing of any raw or leaf tobacco, or otherwise preparing raw or leaf tobacco, or manufactured or partially manufactured tobacco or snuff, or the putting up for use or consumption of scraps, waste, clippings, stems, or deposits of tobacco resulting from any process of handling tobacco, or by the working or preparation of leaf tobacco, tobacco stems, scraps, clippings, or waste, by sifting, twisting, screening, or any other process, shall be regarded as a manufacturer of tobacco.

It was obvious from this enactment that the Congress intended to extend the meaning of "manufacture" beyond that as usually understood and accepted. The Congress did the same thing by Section 972, Title 26 USCA, where a manufacturer was defined to be:

Every person who manufacturers oleomargarine for sale shall be deemed a manufacturer of oleomargarine. And any person that sells, vends, or furnishes oleomargarine for the use and consumption of others, except to his own family table without compensation, who shall add to or mix with such oleomargarine any substance which causes such oleomargarine to be yellow in color, determined as provided in paragraph 2 of Section 971 (a), shall also be held to be a manufacturer of oleomargarine within the meaning of this chapter.

By reason of the fact that the Congress in dealing with the same subject, that is Internal Revenue, found it necessary to give to the words under discussion a special meaning in some cases would carry the implication that the use of the words, in the absence of such special definitions, would be understood in the ordinary and usual sense.

(CASES COMPARED.)

3. In the case of Friday v. Hall and Kaul Co., 216 U. S. 449, the Supreme Court of the United States reversed the Third Circuit Court of Appeals, 158 F. 593, where a question arose on a proper interpretation of the word "manufacturing" as used in Bankruptcy Law. Unhappily, the Court of Appeals had held that the production of concrete arches, etc., was not manufacturing within the purview of the bankruptcy law. The Supreme Court said it was. At p. 454, the Supreme Court said that "manufacturing has no technical meaning." Yet it quoted approvingly the language of Mr. Justice Field in Kidd v. Pearson, 128 U. S. 1, l. c. 20, where it said that:

"Manufacture is transformation, the fashioning of raw materials into a change of form for use."

The court then adverted to the case of Tide Water Oil Company v. United States, 171 U. S. 210, l. c. 216, and approved the meaning of the word "manufacturing" as there used as follows:

Mr. Justice Brown, referring to the expansion of the meaning of the word "manufacture", said that "the word is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product."

In the same opinion the court also approved an opinion of the Eighth Circuit, styled In re First National Bank, 152 F. 64, wherein the late Judge Walter H. Sanborn defined manufacturing as follows:

Its ordinary significance is producing a new article of use * * * by the application of skill and labor to the raw materials of which it is composed.

A case having many features similar to the case now being considered is that of Cate v. Connell, 173 Fed. 445, l. c. 447, where the court said:

We do not think that the repairing of automobiles * * * can fairly be described as a manufacturing pursuit. It seems to have been chiefly, if not altogether, the adjustment of automobile parts bought from other persons, to existing automobiles.

Corpus Juris defines manufacture as "anything made from raw materials by the hand, by machinery, or by art." 38 C. J., Section 4, 966.

As a verb it is defined to mean:

To change and modify natural substances so that they become articles of value and use. 38 C. J., Section 5, p. 966.

In Words and Phrases, Vol. 4, p. 273, manufacturing is distinguished from repairing. It is there said:

* * * for "manufacturing" is the system of industry which produces manufactured articles, and "manufacture" is the production of articles for use from raw or prepared materials, by giving them new forms, qualities, and properties, or combinations, and "repairing" is the making or restoring of an article or thing to its completeness.

The case cited in support of this distinction was State v. Newman Lumber Co., 59 South, 923, l. c. 926; 102 Miss. 802.

(Repair v. Manufacture)

4. In this case the plaintiffs acquired by purchase or exchange all worn and defective generators and armatures and by a process of cleaning, repairing and supplying new parts, the generators and armatures were restored and reconditioned for further use.

As thus repaired and reconditioned the devices were sold, sometimes in quantities. Under the taxing law under observation the original manufacturer paid a tax on the devices unless sold to the manufacturer of a motor vehicle in which they were to be used, in which case a tax was paid on the fully equipped motor vehicle. If sold as an accessory by the manufacturer a tax was paid as required by statute but this was all of the manufacturer's tax.

To give the statute the meaning contended for by the government would involve endless complications as affecting dealers, garage owners and repair men in general. No definite line could well be drawn and twilight ones would develop so frequently and from so many angles that a just and fair and practicable enforcement of the law would become impossible.

It seems obvious that the Congress never intended that the tax should be applied as in this case. Accordingly the plaintiffs are entitled to have judgment for a return of the tax required of them. An appropriate journal entry to this end will be prepared and submitted by counsel for the plaintiffs.

(Reprinted from Commerce Clearing House, 1939 Standard Federal Tax Service, Vol. 4, Paragraph 9219.)

Clawson and Bals, Inc., a corporation, v. Carter H. Harrison, Collector of Internal Revenue in and for the First District of Illinois.

United States District Court, Northern District of Illinois, Law 47068. Decided November 26, 1938.

FINDINGS OF FACT.

1. Plaintiff, Clawson & Bals, Inc., is a corporation duly organized and existing under the laws of Illinois and, during the times herein mentioned, had its principal office and place of business in the City of Chicago, State of Illinois, and within the Northern District of Illinois and the Eastern Division thereof.

2. The defendant, Carter H. Harrison, was appointed Collector of Internal Revenue in and for the First District of Illinois, on August 21, 1933, and has been such Collector of Internal Revenue at all times subsequent thereto, and is a citizen, resident and inhabitant of the Northern District of Illinois.

3. Plaintiff was incorporated April 17, 1925, and its purpose, among others, was "to manufacture, buy, sell, export and import, deal in and deal with, all kinds of automobile and automobile accessories, and any and all other articles, incident to automobiles." Its principal business, however, has been to make automobile connecting rods and sell them throughout the world to wholesalers, known also as jobbers, for replacement purposes in connection with the repairing by garagemen and mechanics of automobile motors. It made such connecting rods from new forgings, or castings, as well as from

forgings or castings or worn-out and discarded connecting rods.

4. Prior to and since June 21, 1932, plaintiff operated seven plants or factories, namely, a large one in Chicago, and six smaller ones in Moline, Illinois, Minneapolis, Detroit, New York City, Atlanta and Dallas, for the making of connecting rods. It maintained warehouses in divers cities from which it distributed its product and had points of distribution in other cities. It employed salesmen and engaged manufacturers' representatives for the distribution of its products.

5. Plaintiff has one hundred employees engaged in the production of connecting rods, of which forty are employed in the Chicago plant and sixty in the other six plants. Its plant equipment includes, among other things, lathes, drill presses, broaching machines, boring jibs, babbitt pots, emery wheels, special molds and babbitting machines, which were used in the production of the connecting rods in question.

6. Plaintiff produced and maintained a stock of more than five hundred different types of connecting rods, assigned to each type a stock number of its own, such as CB1, CB2, down to CB524, covering all makes of automobiles. All of plaintiff's connecting rods were designated and known to the trade by the trade names, "C & B Rods", and were sold under such trade name. Plaintiff advertised in the leading trade journals and publications and was listed in the Chicago classified telephone directories under the classification of Automobile Parts—Manufacturers. It was also a member of the Manufacturers Division of the National Standard Parts Association, a trade association.

7. The connecting rod is the means of transmitting power generated by discharge in the cylinder, in the piston head, to the crank shaft by being attached to the crank pin. In the large end of the connecting rod there is a babbitt bearing known as the crank shaft bearing. The babbitt bearing is within the parts of the rod known as the cap and shank, which are held together by two bolts and nuts. The other, or smaller end of the rod, is known as the wrist pin end. At least half of the rods produced by plaintiff during the taxable period had bronze bushings in the wrist pin end. The bushings are also bearings and are just as important and just as necessary as the babbitt bearing at the large end. The one bearing cannot work successfully without the other.

8. During the taxable period, June 21, 1932, to June 30, 1936, plaintiff's total sales of automobile connecting rods aggregated $4,355,752.50. All such sales were of connecting rods manufactured and produced by plaintiff, as hereinafter set forth, both from new castings or forgings which plaintiff purchased and machined as well as from worn-out and discarded connecting rods which plaintiff obtained either from "junkies", or from jobbers who turned them in as part payment on purchases from plaintiff on what is known in the trade as the exchange basis for replacement parts. A "Junkie" is a man who goes to garages, automobile wreckers, and elsewhere where he can procure used and discarded parts which he thereafter sells to plaintiff and others. None of the used, worn-out and discarded connecting rods had any commercial value as automobile parts because they were no longer fit for use. They were scrap and had only a junk or scrap value when acquired by plaintiff and, although such scrap was recognized as having once been connecting

rods, a manufacturing process was necessary in order to make a new and serviceable product. Plaintiff carried on that manufacturing process. The scrap material was dismantled and prepared for the manufacturing process; it was combined with new materials, put through grinding operations, machining operations, there was an assembling and combining of all materials, together with workmanship, and the employment of skill before plaintiff's marketable article was produced. The completed article as manufactured and produced by plaintiff had a value relatively much greater than that of the worn-out article in its scrap condition. In other words, plaintiff manufactured and produced connecting rods from scrap.

9. The following is a summary of plaintiff's processes and operations in the manufacture and production of connecting rods from scrap:

The worn-out, unusable and discarded rods came to plaintiff in packages, boxes and bags. Plaintiff opened and checked them against the shipping ticket; they were thrown on a table and sorted out according to their particular makes and numbers. At least during the period December, 1934, and for at least five or six months in 1935, plaintiff ground off of all worn-out rods originally made by General Motors Corporation and its subsidiaries, the trade names and other marks of identification pursuant to an agreement with General Motors.

The forgings went into the babbitt room where the two bolts and nuts were taken out and the cap and shank separated. Some bolts and nuts were salvaged, others were junked. The shank and cap were separately placed in a melting pot and all old babbitt metal and what remained of the original babbitt bearing was rewound. The old babbitt was sold as salvage. Plaintiff used entirely

new babbitt in all of its babbitting processes. The babbitt metal consisted of 89% tin, 3.7% copper, and 7.3% antimony. A flux was then applied to prepare the cap and rod for a coating of tin to act as a bond and make the new babbitt metal stick so as to become part of the steel forging. After applying the flux, the arm (shank) and cap were separately dipped into a pot containing molten tin. The tin coating was necessary in order to band the steel forging and babbitt together. The cap and arm are separately put into a machine with the proper size mold, between which mold and the cap on the one hand and the mold and the arm on the other, a man poured new molten babbitt metal. The two parts were then removed from the machine and permitted to cool. The newly poured babbitt extended beyond each side of what was to become the babbitt bearing. Before the cap and arm were assembled, each was subjected to lathing operation and the protruding babbitt was thereby cut away so as to leave an even surface and permit the two parts to fit together and make a circle when assembled. Then the cap and arm were assembled by putting in new shims (if it was the type of rod which required shims) and bolts and nuts. The rod and cap were placed upon a machine which turned and tightened each of the nuts.

The inside of the new babbitt bearing was rough bored on a machine to approximately 10/1000ths smaller than what was to become the finished diameter. Then the cutters were changed and a broaching operation occurred whereby the babbitt bearing was further cut, grooved, and channels were cut on the inside of the babbitt bearing for oiling purposes, and it was drilled through, where necessary, in order to connect with the oil holes in the steel forging or casting. In a further and final broaching

operation the babbitt bearing was cut, that is, machined, to the prescribed diameter. The assembled rod was then placed on a pressing machine and a new bronze bushing placed above the old bushing and, under pressure, the old one was forced out and the new one was forced in. In the case of connecting rods for Fords, a further machine operation was required by which the bushing was completely severed and grooved on the inside. All of the rods were then checked for alignment and twist in order that they would leave plaintiff's plant as a perfect rod. Each was placed in a vertical position upon a jig machine, part of which went through the opening in the wrist pin end and another part through the opening at the crank shaft end. The indicator would show just how much it was out of line and the necessary adjustments then were made. At least half of the rods made by plaintiff were the type that required bushings. After the rod had been aligned, it would go to a bench where a man inspected it and if there were any pieces of babbitt hanging on the sides, he would take them off and clean the rod wherever necessary. The rod was carefully inspected for blow holes, which occurred now and then, and was given such inspection as was necessary to insure a product as perfect as modern machinery can produce. The rods were then placed in a machine where they were covered with grease. After being greased, they were taken in the stock room and placd on shelves in separate bins containing plaintiff's part number, which numbers conformed to those used on plaintiff's price lists and catalog. The rods were boxed and labeled just before shipping. The boxes were labeled at both ends. The label contained a description of the contents, name of the car which the rods would fit, the number or model, plaintiff's number, that is, CB-1, CB-2, as the case may be, together with plaintiff's name

and a trade symbol consisting of the letters "C. & B." in a small solid circle. The same type of label was placed on the ends of all boxes in which plaintiff shipped connecting rods, whether they contained inside rods made entirely of virgin metal, or from worn out rods, or a mixture of each.

10. Plaintiff kept but one stock with respect to each number and had but one outright price with respect to the rods, irrespective of whether they were produced from entirely new castings or from scrap, and regarded the article made from scrap as equivalent to any similar product made entirely with virgin metal. The rods made from scrap were in competition with similar products made entirely of virgin metal and were just as serviceable. They were held out for sale and sold on the same basis and under the same warranties as the connecting rods produced from entirely virgin forgings. In other words, plaintiff made no distinction between such connecting rods in the numbering, cataloging, selling, billing, advertising, shipping, labeling, pricing, marketing, quality, warranty, guarantee, or otherwise.

11. When new casting or forgings arrived at the babbitting place, they went through substantially the same routine, the same processes, operations, assembling and finishing as outlined in the immediately preceding paragraph with respect to the production by plaintiff of connecting rods from scrap, that is, from used or worn-out connecting rods. Whether new castings or scrap were used the operations commencing with the babbitting stage were handled by the same men and on the same machines. All of plaintiff's processes involved grinding operations, machining operations, assembling and combining of materials, together with workmanship and the employment of skill before the connecting rod was completed.

12. Plaintiff filed monthly excise tax returns on all of its sales of connecting rods occurring during the period June 21, 1932 to June 30, 1936, inclusive, and reported a total tax of $42,606.10, which it paid in monthly amounts. Thereafter, the Commissioner of Internal Revenue determined that the aggregate tax due by plaintiff for the period June 21, 1932 to June 30, 1936, inclusive, was $87,115.05. Accordingly, additional assessments were duly made in the total further amount of $44,508.95 tax and $9,732.07 interest. The additional assessments were based upon the commissioner's finding that plaintiff did not report that portion of the sales price which was paid by an allowance made for a used or worn-out connecting rod or rods, in such of the sales transactions as did not involve all cash but consisted partly of cash and partly of such an allowance. On February 8, 1937, plaintiff paid to defendant as Collector of Internal Revenue, $48,142.52, and on March 18, 1937, paid the remaining $6,089.50.

13. On February 26, 1936, plaintiff filed a claim for the refund of $54,232.02, representing $44,508.95 of the foregoing tax assessments of $87,115.05 and $9,723.07 of interest so assessed and paid. The claim was predicated upon the ground that plaintiff was neither the manufacturer nor producer of the connecting rods on which the additional tax was based but that its process, "constituted only the repair", of used and second-hand connecting rods; also that it bore the burden of the tax. On March 30, 1938, the Commissioner of Internal Revenue rejected plaintiff's claim.

14. All of the automobile connecting rods manufactured, produced and sold by plaintiff during the taxable period June 21, 1932 to June 30, 1936, inclusive, as aforesaid, are automobile parts or accessories.

15. Plaintiff is and was the manufacturer and producer of all of the automoble connecting rods involved in this suit.

16. The allowance granted by plaintiff to customers who turned in used or worn-out connecting rods on account of purchases of plaintiff's connecting rods constituted parts of the total sales price.

CONCLUSIONS OF LAW.

Upon the foregoing findings of fact the court makes and enters the following conclusions of law:

1. Plaintiff was and is a manufacturer and producer of automobile parts within the meaning of Section 606 of the Revenue Act of 1932.

2. Plaintiff was and is the manufacturer and producer of all of the automobile connecting rods sold by it and upon which the tax sought to be recovered was assessed against and collected from plaintiff.

3. The taxes assessed against and paid by plaintiff under the provisions of Section 606 of the Revenue Act of 1932, were lawfully assessed and collected.

4. Under the law and the evidence, defendant is entitled to judgment of dismissal with costs.

To the making and holding of the foregoing findings and conclusions, the plaintiff objects and excepts.

(Reprinted from Commerce Clearing House, 1940 Standard Federal Tax Service, Vol. 4, Paragraph 9619.)

Moroloy Bearing Service of Oakland, Ltd., a corporation, Plaintiff, v. United States of America, Defendant.

Southern Division of the District Court of the United States for the Northern District of California. No. 21308-W. Decided July 16, 1940.

MEMORANDUM OPINION.

This is an action wherein the plaintiff seeks to recover from the defendant the sum of $1090.80 which it paid the defendant as excise tax under Section 606 (c) of the Revenue Act of 1932 upon the sale of rebabbitted connecting rods from 1933 to 1936.

The plaintiff now is and for a considerable time last past has been engaged in the business of rebabbitting connecting rods for the automobile trade generally in this state. When the rebabbitting of the connecting rods was finished, the connecting rods were delivered to the repairing jobber who in turn sold them to the garage or automobile repair man.

Plaintiff's right to recover herein depends upon whether the process of rebabbitting the connecting rods was one of manufacture or one of repair. If the former, the tax was properly imposed. If the process was one of repair only, then the tax was not owing and plaintiff may recover.

The evidence shows the connecting rods which plaintiff rebabbitted were in their original state manufactured by others, and only came into the hands of the plaintiff when certain parts of them became defective either from the burning out of the babbitt through friction while in operation, or through lack of proper lubrication, or on account of other causes.

In no manner did the evidence show the plaintiff manufactured the connecting rods themselves, but on the contrary, the evidence clearly showed that plaintiff was engaged in the repair and rehabilitation of connecting rods manufactured by others, when they became outworn and defective from use.

In Bouvier's Law Dictionary (Rawle's Revision, Unabridged) the words manufacture and repair, when used as verbs, are defined as follows:

Manufacture—To make or fabricate raw materials by hand, art, or machinery, and work into forms convenient for use.

Repair—To restore to a sound state after decay, injury, delapidation, or partial injury.

It would be just as logical to hold that a shoe cobbler was a manufacturer of shoes that were brought to him for repair because he nailed or sewed soles and heels on the shoes in the process of repairing them, as to hold that a mechanic was a manufacturer of connecting rods because he rehabilitated them. The process is a repair in the one case just as it is in the other. That plaintiff is repairing its own rods for sale whereas the shoe cobbler is repairing shoes for others is not significant. Whether or not a process is one of repair does not depend on the condition of the title to the repaired articles.

The court orders that judgment be entered in favor of the plaintiff in the sum of $1099.80, with interest thereon as provided by law.

Let findings of fact and conclusions of law, and judgment be prepared in accordance with the opinion of the court.

MARTIN I. WELSH,
United States District Judge.

(Reprinted from Commerce Clearing House, 1940 Standard Federal Tax Service, Vol. 4, Para. 9608.)

In the District Court of the United States for the Southern District of California, Central Division.

J. Leslie Morris Company, Inc., plaintiff, v. United States of America, defendant. No. 433-M Civil.

CONCLUSIONS OF THE COURT.

McCORMICK, District Judge:

When consideration is given to the irreconcilable conflict of federal court decisions upon the crucial factual issue in this action, *i. e.,* whether taxpayer in rebabbitting used and damaged connection rods of automobiles is a manufacturer or producer of such parts or accessories, it is indisputable that there is more than doubt as to the meaning of the terms "manufacturer" or "producer" in Section 606 of the Revenue Act of 1932 and Subsection (c) thereof. 47 Stat. at Large, Part 1, pp. 261-262, Title 33 U. S. C. A., Sec. 606.

Under such a record doubts arising under the taxing statute should be resolved against the taxing agency and favorable to the taxpayer. Miller v. Nut Margarine Co., 284 U. S. 498, at page 508; Erskine v. United States, 9 Circuit, 1936, 84 F. (2d) 691.

It is only by straining the terms "manufacturer" and "producer" contained in the taxing statute under consideration from their usual, ordinary and normally understood meanings into all-inclusive situations that these terms of

doubtful signification can be extended to a service station or processor such as plaintiff taxpayer, whose transactions under consideration in this cause are actually no more than repairing damaged used connecting rods of automobiles and charging for the repair job and service upon delivery of the customer's repaired rod or of another rebabbitted second-hand repaired rod. We think no such forced and omnibus meaning of the terms "manufacturer" or "producer" can be fairly attributed to Congress in order to subject the articles sold by the plaintiff to the tax under (c) of Section 606. There is nothing in the statute which intimates that such was the congressional intent. The decision of the District Court for the Northern District of California in A. P. Bardet et al., d.b.a. Pioneer Motor Bearing Co. v. United States, No. 20364L, decided May 18, 1938, 384 C. C. H. p. 10,589, where the taxpayers suing are competitors of the plaintiff who had engaged in a like process and business of rebabbitting connecting rods of automobile engines, as the taxpayer, and who were held not to be manufacturers under the same statute as here involved, persuades us to conclude that the operations and practices shown by the record before us are neither manufacture nor production of automobile parts within the meaning of Subsection (c) of Section 606, Revenue Act 1932.

Our conclusions are also supported by the decision of the District Court (Mo., 1937) in Hempy-Cooper Mfg. Co. v. United States, 19 Am. Fed. Tax Reports 1313, and Con-Rod Exchange, Inc., v. Hendrickson (D.C. W.D.

Wash., 1939), 28 F. Supp. 924. These cited tax cases involved rebabbitted connecting rods of automobiles, and we think they present situations identical with the record before us in this action.

For the sake of uniformity, if for no other reason, taxpayers identically situated and doing precisely the same thing in relation to tax laws should be treated alike. Our inquiries and investigations have failed to disclose that the government has taken appeal in the cases referred to, and we are therefore justified in assuming that refunds have been made to the respective taxpayers situated as is the plaintiff taxpayer in this action.

We are not unmindful of the decision of the Seventh Circuit Court of Appeals in Clawson & Bals, Inc. v. Harrison, Collector, 108 F. (2d) 991, reaching a contrary conclusion as to the meaning of the terms "manufacturer" and "producer" as applied to rebabbitting activities similar to those shown by the record before us. This decision by a federal appellate court is entitled to and has been given careful study and respectful consideration. We feel, however, that no adequate discussion is to be found in the opinion of the court, differentiating between the broad meaning of the terms in matters of general concern and those relating specifically to tax laws. Such a distinction is supported by eminent authority, and we believe it must be regarded in ascertaining the meaning of tax legislation where the taxing statute itself does not clearly define the meaning of terms contained in it. See Hartramft v. Wieg-

man, 121 U. S. 609; Kuenzle v. Collector, etc., 32 Philippine 516, and Heacock Co. v. Collector, etc., 37 Philippine 979.

We think the rule of *stare decisis* is not applicable to the decision of the learned Court of Appeals of the Seventh Circuit. See Continental Securities Co. v. Interborough R. T. Co., 165 F. 945, at p. 960.

Inasmuch as our Circuit Court of Appeals has not considered or decided the question under consideration in this section, we are justified in formulating and reaching our own conclusions under the record before us and in the light of other identical situations considered and determined uniformly by the federal courts of the Ninth Circuit. Accordingly, as the plaintiff taxpayer has not passed on the tax to the customer or to anyone, it is entitled to recover the amount illegally collected, and the government is not entitled to anything under its counterclaim.

Findings and judgment are ordered for the plaintiff and against the defendant as prayed under the issues of complaint, answer and counterclaim.

Dated this July 24, 1940.

(Reprinted from Commerce Clearing House, 1940 Standard Federal Tax Service, Vol. 4, Para. 9691.)

Armature Rewinding Company, a corporation, plaintiff, v. United States of America, defendant.

District Court of the United States, Eastern Judicial District of Missouri, Eastern Division. No. 12618.

Eliot, Blayney & Bedal, St. Louis, Mo., for plaintiff. Harry C. Blanton, U. S. Attorney, and Russell Vandivort, Assistant U. S. Attorney, both of St. Louis, Mo., and Samuel O. Clark, Jr., Assistant Attorney General, and Andrew D. Sharpe and George H. Zentzius, Special Assistants to Attorney General, all of Washington, D. C., for defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

MOORE, District Judge: The Court makes the following findings of fact and conclusions of law:

1. Plaintiff, Armature Rewinding Company, is and was at the times hereinafter mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, with its principal office and place of business in the City of St. Louis, Missouri, and within the Eastern District of Missouri and the Eastern Division thereof. It also had a branch office at Allston, Massachusetts, near Boston up to May 31, 1935.

2. Plaintiff was incorporated August 17, 1922, and the Articles of Incorporation stated in part as follows:

"The purpose for which the corporation is formed is as follows: To manufacture, buy, sell, repair, remake, rewind, remodel, prepare for use and furnish for sale all kinds of batterys, automobile generators, automobile starters, auto-

mobile accessories and electrical parts and armatures and to furnish for sale all articles used in the manufacture, sale and distribution of any and all of the aforementioned articles. To buy, sell, hire, manufacture, improve and deal in all apparatus, machines, materials, articles and property of all kinds which are capable of being used for such purposes and to acquire, mortgage, exchange, sell or in any other way dispose of any and all personal property which may be used for the purpose of said corporation, and finally, to do in addition any and all things not herein enumerated which may tend to promote the objects and purposes above set forth."

3. From February 8, 1934, to May 31, 1937, the taxable period herein involved, plaintiff's business on which plaintiff claims a tax was illegally collected from it by defendant, consisted in acquiring in the manner hereinafter set forth used and defective automobile generator units and armatures, testing the same so as to discover the defects therein, remedying such defects by the operations hereinafter described and selling the generators and armatures as hereinafter set out.

4. At least 95% of the sales made by plaintiff and on which defendant collected the tax were on what is known as the "exchange basis", that is, the buyer sent to plaintiff a used generator unit or armature of the identical type and model with the one purchased and received a credit on the purchase price therefor. At least 95% of the generator units and armatures acquired by plaintiff were acquired in this manner. The balance were purchased by plaintiff from garagemen and automobile wreckers.

5. All of the said generator units and armatures received by plaintiff were originally manufactured by per-

sons, firms or corporation other than plaintiff and before their acquisition by plaintiff had been used as operating parts of automobiles and by reason of such use were worn, burned out or otherwise damaged or impaired.

6. Plaintiff imported none of the articles in respect of which said excise taxes were paid, but obtained all of them from sources within the United States. Plaintiff has not at any time imported any automobile parts or accessories.

7. The automobile generator unit is a cylindrical mechanical unit which by recharging the storage battery, generates and produces the needed electrical energy in connection with the operation of an automobile. It is usually attached by bolts to the side of the automobile motor and driven by the fan belt over a pulley protruding from the front end of the generator, or by gears. Within the cylindrical metal casing of the generator are the field coils and the armature which function as a small dynamo. The armature is in a horizontal position and revolves within the generator casing. The armature consists of a steel shaft, the laminations and commutator. A steel shaft runs through the center of the armature. The shaft has attached to it what are known as the core and the commutator. The commutator is a copper cylinder with grooves caused by assembling numerous segments of copper bars. Next to the commutator is that part of the core consisting of anywhere from sixty to eighty metal segments or laminations. The laminations have numerous slots over each of which is wound insulated copper wire. The winding of the wire over the laminations results in the formation of numerous coils. Over the commutator are placed three carbon brushes held by what are known as brushholders. There are approximately one and one-

quarter pounds of copper in the average armature including the wire and commutator.

8. Plaintiff's operations and processes consisted of removing the armature from the generator unit, testing the generator and armature for defects and remedying the defect or defects discovered. The method of procedure with each generator unit was as follows:

(a) First the dust band was removed. Plaintiff has never found one of these broken. However, occasionally units have been received with this band missing. In such instances, the missing band is replaced with a band from a unit purchased from a car-wrecker. Next the generator and plate bolts are removed. There are two bolts in each generator. These are ordinary machine bolts used generally and not made specially for use in automobiles. When they were found to be damaged, new ones were purchased and used.

(b) Plaintiff has never experienced a broken generator frame or casing and in every instance has made use of the old generator frame without change.

(c) The armature with the drive and plate and pulley attached was then removed from the generator and the pulley was removed from the drive end shaft and, if found broken or defective, which occurred in very rare instances, it was replaced by a new or used one. United States excise tax was paid by plaintiff at the time of purchase of such new pulleys, as this type of pulley is made only for use in automobiles.

(d) The drive end plate of the generator was then pressed off and the ball bearing in this plate tested by turning it. If the bearing is defective, which was true in

approximately 50% of the occasions, a new or used bearing was put in. These are ordinary ball bearings, used on various mechanical apparatus other than automobiles, and they are not made specially for use in automobiles.

(e) The armature was then tested on an armature tester or growler. If not defective, it was simply cleaned. If defective, the old wire was removed and new soft copper wire rewound on the armature. This is ordinary copper wire, purchased on the open market, used generally and not made specially for use in automobiles.

(f) The commutator was then tested. If found defective, it was disassembled and the paper strips between the segments were replaced with mica obtained by cutting strips of the proper size from standard sheets of mica purchased by plaintiff on the open market. Such sheets are in regular use and are not made especially for use in automobiles. The identical segments were always put back in the same commutator. In a few instances where the segments of a commutator were found defective, another new or used commutator was replaced in the armature. If a new commutator was used, plaintiff paid the excise tax when purchased.

(g) If the shaft of the armature had become undersized by wearing, a sleeve of regular seamless tubing was pressed on the shaft and the shaft ground back to size. The seamless tubing is a regular article in general use, not made specially for automobiles, and was purchased by plaintiff on the open market.

(h) The armature was then reassembled, dipped in varnish and allowed to dry.

(i) The brush-holder end plate of the generator was then removed and the brush-holders tested for grounding. If any brush-holder was defective, it was replaced with a new one purchased by plaintiff on which the excise tax was paid at the time of purchase. In every case the carbon brushes were replaced. These were purchased by plaintiff and the excise tax was paid by plaintiff on such brushes at the time of purchase, as they are manufactured only for use in automobiles.

(j) The field coils inside the generator frame were then tested. If they were found sound, which was true in most instances, they were not touched. If the test proved negative, the field coils were removed and new coils prepared by winding soft copper wire in a mould of the same size as the old coil. Approximately one-half pound of wire was used in preparing each coil. The wire is a regular soft copper wire, purchased on the open market and not made specially for use in automobiles. Frequently a field coil was found to be oil-soaked but otherwise good, in which event the tape was removed and new tape put on. This tape is ordinary commercial soft cotton tape, purchased on the open market, and not made specially for use in automobiles.

(k) The clips on the field coil terminal were replaced if defective with new ones purchased by plaintiff. These clips are used in various other mechanical apparatus such as radios and storage batteries of all kinds and are not made specially for use in automobiles.

(l) The ball bearing or bronze bushing on the commutator and of the armature was then examined and if found defective was replaced with a new or used bearing or bushing. Such bearings are identical in type with the

bearings in the drive end plate described in paragraph (d) above. Used bearings are purchased from car wreckers. They are not made specially for use in automobiles.

(m) No original numbers, names or identifying marks on generators or armatures when acquired by plaintiff were changed or removed by plaintiff. The letters "A.B.C." were stamped by plaintiff on the generator frame to identify it in the event the generator proved defective subsequent to plaintiff's operations.

(n) In case defective armatures alone were sent in by plaintiff's customers, they were, where necessary, rewound (as described in Section (e) above) and also put through the operations mentioned in sections (f), (g) and (h) above.

(o) The following parts of each old generator unit were with rare exception usable by plaintiff and were used in the rebuilt product:

1. The generator frame or casing;

2. The brush-holder and plate, not including, however, the brushes and brush-holders;

3. The drive end plate, not including the bearing therein;

4. The dust band;

5. The shaft of the armature including the laminations. The shaft was built up in some instances as described in section (g) above;

6. The generator and plate bolts.

The weight of the parts above mentioned in this paragraph was thirteen pounds in a Ford generator unit and sixteen pounds in a Chevrolet generator unit. The total weight of a rebuilt Ford generator unit was seventeen pounds and the total weight of a Chevrolet rebuilt generator unit was nineteen pounds.

9. During the period herein involved, the following prices prevailed in the St. Louis District:

A Chevrolet generator unit purchased new would cost a jobber $9.00 and a dealer $11.25, and a Ford generator unit purchased new would cost a jobber $6.20 and a dealer $8.75. Chevrolet rebuilt generator units were sold outright by plaintiff to jobbers for $3.45 and to dealers for $4.45, and if a defective generator unit was taken by plaintiff in exchange, the net amount received by plaintiff was $1.95 from jobbers and $2.95 from dealers. Ford rebuilt generator units were sold outright by plaintiff to jobbers for $5.45 and to dealers for $6.45, and if a defective generator unit was taken by plaintiff in exchange, the net amount received by plaintiff would be $1.95 from jobbers and $2.95 from dealers. Prices of new generator units for other kinds of automobiles bore practically the same relation to the prices for plaintiff's rebuilt generator units as those mentioned above in the case of Ford and Chevrolet generator units.

A Chevrolet armature purchased new would cost a jobber $2.10 and a dealer $2.62 and a Ford armature purchased new would cost a jobber $1.75 and a dealer $2.27. Chevrolet and Ford rewound armatures were sold by plaintiff to jobbers for $1.71 and to dealers for $2.09, and if a defective armature was taken by plaintiff in exchange, the net amount received by plaintiff was $.95 from jobbers and

$1.33 from dealers. Prices of new armatures for other kinds of automobiles bore practically the same relation to the prices for plaintiff's rewound armatures as those mentioned above in the case of Ford and Chevrolet armatures.

10. Of all generators acquired by plaintiff, the armatures therein were rewound in not over 50%.

11. The average cost of materials used in rebuilding a generator unit aside from the cost of acquiring the defective generator was 76.41 cents. The average cost of labor in rebuilding a generator was 40 cents.

12. The average cost of materials used in rewinding an armature, aside from the cost of acquiring the old armature was 27.6 cents. The average cost of labor in rewinding an armature was 29.76 cents.

13. After the processes and operations described in Section 8, the generators were packed in pasteboard boxes and labeled as follows: "Genuine A-R-C Rebuilt Generator Catalog No. —". In instances where armatures were packaged separately from generators, they were packaged and labeled in the same manner except the words "Rewound Armature" were used in place of words "Rebuilt Generator."

14. Plaintiff assigned its own code number to all its generators and armatures and the number placed upon the boxes corresponds to the code number of the article in plaintiff's catalog.

15. In disposing of or selling generators or armatures, plaintiff invariably sold or exchanged them as rebuilt generators or rewound armatures. In no instance did the plaintiff ever represent its armatures or generators as new products, nor did it build a complete generator or armature

out of virgin materials or assemble a generator or armature from wholly new parts.

16. Rebuilt generators and rewound armatures were widely known and used in the automobile industry for many years prior to the enactment of Section 606 of the Revenue Act of 1932. At the time of the enactment of such Revenue Act and for many years prior thereto, there were many persons, firms and corporations in various parts of the United States engaged in the business of rebuilding generators and rewinding armatures in much the same fashion as plaintiff.

17. The business district of plaintiff was within a radius of 200 miles of St. Louis, Missouri. There were infrequently, however, transactions in other parts of the United States.

18. Plaintiff had fifteen to eighteen employees during the taxable period February 8, 1934, to May 31, 1937. Its plant equipment included, in addition to small tools, 3 lathes, 1 drill press, 3 punch presses, 1 arbor press, 1 milling machine, 1 polishing machine, 1 grinding wheel, 1 coil winding machine, 1 stripping machine, 2 chucks, 6 growlers and 1 commutator assembly fixture, which were used in the generator and armature operations involved in this suit.

19. Plaintiff filed monthly excise tax returns with respect to the cash received from its sales of said armatures and generators occurring during the period February 8, 1934 to May 31, 1937, inclusive, and reported a total tax of $1,368.75, which was paid in monthly installments as shown by Exhibit 1 attached to plaintiff's amended petition and introduced in evidence as Plaintiff's Exhibit 18. This

amount included tax on sales by plaintiff from its branch plant and office near Boston, Massachusetts, up to May 31, 1935.

20. On July 19, 1937, a claim for the refund of said $1,368.75 was filed by plaintiff upon the ground that plaintiff was not the manufacturer or producer of the generators and armatures in question, but merely performed processes constituting the repair, rehabilitation or reconditioning of used and second-hand articles; also, that it bore the burden of said taxes and did not pass the same on to its customers and vendees. The Commissioner of Internal Revenue rejected said claim by letter dated March 7, 1938.

21. Of the amount of $1,368.75 paid by plaintiff, plaintiff collected from its vendees as taxes on sales of its said armatures and generators the amount of $229.11. The balance of $1,139.64 was paid by plaintiff, which bore the exclusive burden thereof. None of the latter amount was passed on by plaintiff to its vendees.

22. Inventories of armatures and generators on hand for sale by plaintiff were as follows:

December 31, 1934: The number of generators 128, of which none were obsolete. Usable generators comprised 71 models. The number of armatures 1,198, of which 600 were obsolete. Usable armatures comprised 11 models.

December 31, 1935: The number of generators 132, of which none were obsolete. Usable generators comprised 11 models. The number of armatures 1,138, of which 583 were obsolete. Usable armatures comprised 225 models.

December 31, 1936: The number of generators 129, of which none were obsolete. Usable generators comprised 83 models. The number of armatures 1,164, of which 600 were obsolete. Usable armatures comprised 225 models.

23. The sales of reconditioned generators and rewound armatures in respect of which the excise taxes involved in this case were imposed did not constitute the sales of automobile parts or accessories by the manufacturer, producer or importer.

Conclusions of Law.

From the foregoing findings of fact, the Court makes its conclusions of law as follows:

1. The plaintiff has complied with all statutory conditions constituting conditions precedent to the institution and maintenance of this suit.

2. The plaintiff was not during the times involved in this suit, the manufacturer, producer or importer of generators or armatures within the meaning of Section 606 of the Revenue Act of 1932.

3. The tax imposed by Section 606 (c) of the Revenue Act of 1932 applies only to sales of automobile parts or accessories when sold by the manufacturer, producer, or importer.

4. The excise tax imposed by Section 606 (c) of the Revenue Act of 1932 does not apply to sales of reconditioned generators by one who acquires such generators second-hand and reconditions them as did this plaintiff.

5. The excise tax imposed by Section 606 (c) of the Revenue Act of 1932 does not apply to sales of rewound armatures by one who acquires such armatures second-hand and rewinds them as did this plaintiff.

6. In holding and determining that the tax imposed by Section 606 (c) of the Revenue Act of 1932 applied to this plaintiff's sales of reconditioned generators and rewound armatures during the period from February 8, 1934, to May 31, 1937, the Commissioner of Internal Revenue has exceeded the authority granted him under the Internal Revenue Act of 1932.

7. The plaintiff is entitled to judgment against defendant in the sum of $1,139.64, together with interest thereon as prayed in its amended petition.

Let judgment be submitted for signature and entry in accordance with findings and conclusions.

PARTS AND ACCESSORIES.

Section 606 (c) of the Revenue Act of 1932.

There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

(c) Parts or accessories (other than tires and inner tubes) for any of the articles enumerated in subsections (a) or (b), 2 per centum. For the purposes of this subsection and subsections (a) and (b), spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of, any of the articles enumerated in subsections (a) or (b), shall be considered parts or accessories for such articles, whether or not primarily adapted for such use. This subsection shall not apply to chassis or bodies for automobile trucks or other automobiles. * * *.

Internal Revenue Bulletin, Cumulative Bulletin XII-1, page 384.

REGULATIONS 46, ARTICLE 19:

Scope of tax:

XII-11-6072 S. T. 648.

Taxability of retreaded and rebuilt tires.

Advice is requested whether retreaded and rebuilt tires are subject to the tax imposed by Section 602 of the Revenue Act of 1932.

The X Company purchases used tires from which the old rubber, tread, and side walls (including the name) are buffed off; the carcasses are then retreaded or rebuilt by the use of new and/or reclaimed rubber and sold under various trade names, marked "Retreaded" on the side walls as a protection against any claim by the purchaser that they were sold as "new" tires. The old tires lose their identity in the process of retreading or rebuilding. Other used tires are retreaded by merely resurfacing or replacing the actual tread down to the tread line, the side walls showing the original name and the serial number not being disturbed.

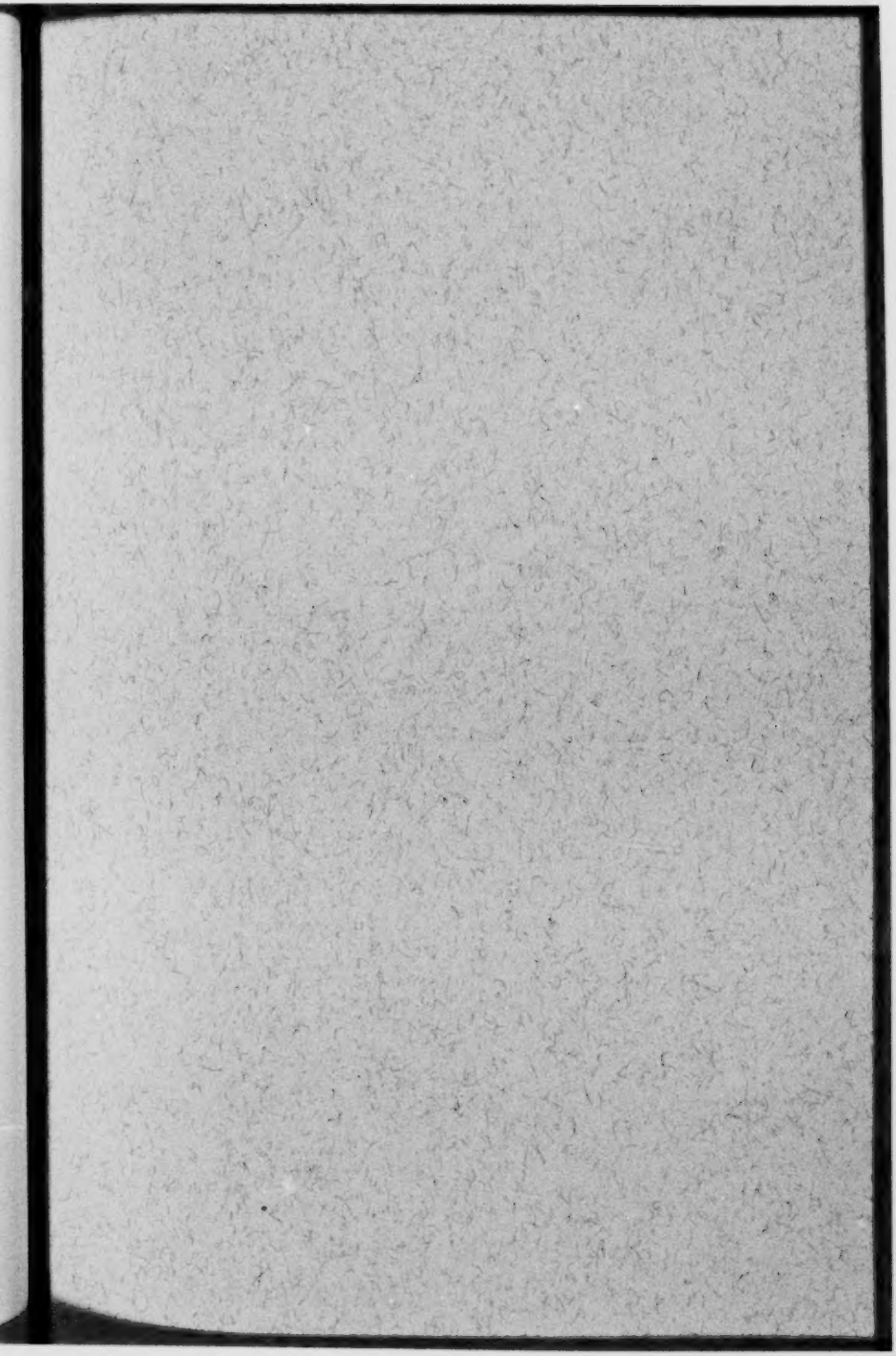
The test of taxability where old material or material partly old and partly new is used in producing a tire suitable for use is whether the work done constitutes the manufacture of a tire or is merely a repair job. If the former, the tax is legally due. If the latter, no tax is involved. It is held that where the identity of the old

tire is lost in the process the manufacture of a taxable tire results.

For example, where old tires are rebuiit from old carcasses by the use of either raw or reclaimed rubber, to the extent that the tires are not identifiable as the original tires, they are subject to tax when sold, on the basis of the full weight thereof, as provided by Section 602 of the Revenue Act of 1932.

Where tires are retreaded or rebuilt to order for customers who retain title to the old tires or carcasses, the person retreading the tires is not subject to tax.

The retreading of old tires by resurfacing or replacement of the actual tread down to the tread line, without altering the side walls or destroying the original identity of the tire, does not constitute the manufacture of a taxable article. (Italics supplied.)



Due service of the within Petition and Brief is hereby acknowledged this.....day of March, A. D. 1941.

_____

_____

3-27-41—65

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	2
Argument	4
Conclusion	7
Appendix	8

CITATIONS

Cases:

American Fruit Growers, Inc. v. *Brogdex Co.*, 283 U. S. 1 — 6
Anheuser-Busch Assn. v. *United States*, 207 U. S. 556 — 6
Biltrite Tire Co. v. *The King*, 1937 Canada Law Rep. 364 — 5
Clawson & Bals, Inc. v. *Harrison*, 108 F. (2d) 991, certiorari denied, 309 U. S. 685 — 5
Edelman & Co. v. *Harrison*, decided April 7, 1939 — 5
Federal-Mogul Corp. v. *Smith*, decided February 23, 1940 — 5
Hartranft v. *Wiegmann*, 121 U. S. 609 — 6
Helvering v. *Reynolds Co.*, 306 U. S. 110 — 7
King, The, v. *Biltrite Tire Co.*, 1937 Canada Law Rep. 1 — 5
King, The, v. *Boultbee Ltd.* (1938), 3 Dominion Law Rep. 664 — 5
Klepper v. *Carter*, 286 Fed. 370 — 7
Moore Bros., Inc. v. *United States*, decided May 14, 1940 — 5

Statute:

Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 606 — 8

Miscellaneous:

Treasury Regulations 46 (1932 Ed.):

Art. 4 — 8
Art. 41 — 9

310215—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 902

ARMATURE EXCHANGE, INC., A CORPORATION, ALSO KNOWN AS THE ARMATURE EXCHANGE, A CORPORATION, ALSO KNOWN AS THE ARMATURE EXCHANGE, INC., A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 11–25)[1] is reported in 28 F. Supp. 10. The opinion of the Circuit Court of Appeals (R. 122–129) is reported in 116 F. (2d) 969.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 17, 1941 (R. 129–130), and a

[1] References are to Volume I of the Transcript of Record unless otherwise indicated.

petition for rehearing, filed February 15, 1941, was denied February 18, 1941 (R. 130). The petition for certiorari was filed March 29, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner was a "manufacturer" or "producer" of armatures for automobiles within the meaning of Section 606 (c) of the Revenue Act of 1932, which imposes an excise tax upon automobile parts "sold by the manufacturer, producer, or importer" thereof.

STATUTE AND REGULATIONS INVOLVED

These are set out in the Appendix, *infra*, pp. 8–9.

STATEMENT

Petitioner was incorporated under the laws of California (R. 28) to carry on the business of manufacturing and assembling armatures, motors and electrical equipment of any and all kinds (R. 106). During the taxable period, petitioner acquired unusable burned and worn out armatures, stripped them to the core, and by various machine and hand operations used the old core and new material to turn out "rebuilt armatures" for sale on the general market. (R. 123–124.) The details of the process are fully described in Finding of Fact VII (R. 32–38) of the trial court and in its

opinion (R. 12–17), and are graphically shown and described by pictures. (Volume II of the Transcript of Record.) Briefly, the process consisted of heating the core, cutting, chiselling and prying out the old wires, stripping the units, slotting each commutator bar, removing solder, aligning laminations, insulation of the base, winding new wires by machine and by hand, painting with solder flux, cutting and trimming wire ends, further insulation with varnish, baking in an electric oven, smoothing, polishing, knurling, testing, checking, stamping, packing and labelling. (Pictures and descriptions, Volume II, Transcript of Record.)

The armatures were sold mostly to jobbers for resale to the public. An allowance was made to the jobbers for used articles turned in. (R. 37.)

Petitioner issued a catalog (R. 60–69) and price lists ranging from $2.65 to $25. (R. 72–73.) Approximately 3,000 armatures were carried on hand in various stages of production and approximately 1,000 in complete form and ready for sale at any time. (R. 80.) The 1,000 finished products represented about 600 different types of armatures. (R. 81.) Sales transactions involved from one to as many as 40 or 50 armatures to a single jobber. (R. 81–82.) Petitioner employed some 14 or 15 men and about 80 completed armatures were turned out, checked, boxed and put on the shelves for sale daily. (R. 83.) These articles were stamped with the petitioner's trade name "Armex" (R. 60–64) and were separately boxed and labelled "Armex

Rebuilt Armature"—"A Quality Product"—"Armex Code—", and serially marked by petitioner's number (R. 77).

On July 1, 1935, a Collector of Internal Revenue informed petitioner that it was liable for the manufacturer's excise tax on its products. (R. 29.) It thereupon filed excise tax returns for the period June, 1935, to and including December, 1936, showing taxes payable of $1,052.30, which were paid. (R. 30.) On September 6, 1935, the Commissioner of Internal Revenue assessed the sum of $1,579.22 as delinquent tax and interest for the period June, 1932, to May, 1935, inclusive, upon which the petitioner paid $400. (R. 30–31.) On April 29, 1937, petitioner duly filed a claim for refund of the tax paid of $1,452.30. (R. 31.) The claim was duly rejected in full by the Commissioner on November 18, 1937. (R. 38.)

On July 15, 1938, petitioner brought suit to recover the tax paid of $1,452.30. (R. 8.) The District Court entered judgment for the petitioner in that amount. (R. 41–42.) The Circuit Court of Appeals reversed. (R. 129–130.)

ARGUMENT

Petitioner contends that it was not a "manufacturer" or "producer" of the armatures sold, but merely a repairer thereof. Certiorari is asked upon two grounds: (1) that seven different United States District Court judges have decided eight similar cases adversely to the Government, and (2)

that the decision below conflicts in principle with decisions of this and various other courts.

1. The decision below is in harmony with that of the United States Circuit Court of Appeals for the Seventh Circuit in *Clawson & Bals, Inc.* v. *Harrison,* 108 F. (2d) 991, which held that a concern engaged in the "rebabbitting" and sale of automobile connecting rods was subject to the manufacturer's sales tax here involved. This Court denied certiorari, 309 U. S. 685. While there has been some diversity of decision among the district courts, that diversity is now largely resolved by the *Clawson & Bals* decision and the decision below: five of the seven district courts referred to by petitioner are in the Seventh or Ninth Circuits.[2] There is no occasion for this Court to review the case in the absence of any conflict among Circuit Courts of Appeals.

---

[2] The two remaining district courts are situated in the Eighth Circuit, and one of the cases has been appealed.

Two district courts and three Canadian courts (construing like provisions of the Canadian Revenue Act of 1927) have held in accord with the decision below. *Edelmann & Co.* v. *Harrison* (N. D. Ill.), decided April 7, 1939, not officially reported but found in 1939 Prentice-Hall, Vol. 1, Par. 5.379; *Federal-Mogul Corp.* v. *Smith* (S. D. Ind.), decided February 23, 1940, not officialy reported but found in 1940 Prentice-Hall, Vol. 4, Par. 62, 510; and *Moore Bros., Inc.* v. *United States* (N. D. Tex.), decided May 14, 1940, not officially reported but may be found in 1940 Prentice-Hall, Vol. 4, Par. 62,676; *Biltrite Tire Co.* v. *The King*, 1937 Canada Law Rep. 364; *The King* v. *Biltrite Tire Co.*, 1937 Canada Law Rep. 1; *The King* v. *Boultbee Ltd.* (1938), 3 Dominion Law Rep. 664.

2. The Supreme Court cases cited by the petitioner (Pet. 15–18) are not in point. None involved the statute upon which this controversy turns, or any related or cognate provisions in the revenue laws. *Hartranft* v. *Wiegmann*, 121 U. S. 609, involved the question of whether certain native seashells which had been cleaned with acid, ground with an emery wheel, and some of them etched with acid, were "manufactured" and therefore dutiable. This Court held them not "manufactured". *Anheuser-Busch Assn.* v. *United States*, 207 U. S. 556, arose under the Tariff Act of 1890, c. 1244, 26 Stat. 567, 617, which provided for a rebate or drawback on articles imported and thereafter exported. Corks were imported, duty paid, from Spain, and after pasteurization were used as corks for bottled beer which was exported. The Court said that the corks had not been "manufactured" in the United States and that not they but the beer was the subject of export. It therefore denied the drawback.

American Fruit Growers, Inc. v. *Brogdex Co.*, 283 U. S. 1, and certain circuit court cases relied upon by the petitioner arose under the patent laws. The *Fruit Growers* case was a suit for infringement of a patented process for preventing citrus fruit from decaying by the addition of a borax solution to the rind. This Court held that a treated orange was not a "manufactured article" and that the patent was therefore invalid. The other patent cases involved the question of what repairs a pur-

chaser of a patented article might make without infringing the patent.

None of these cases has any particular pertinence to the present issue. It should be pointed out, too, that even though some of these cases involved the meaning of the words "manufacture" or "manufactured" in other statutes, Section 606 (c), now under consideration, also uses the word "producer" which is a term of broader scope.

Furthermore, Treasury Regulations since 1920 have defined a "producer" to include a person who "produces a taxable article by combining or assembling two or more articles." Cf. *Klepper* v. *Carter,* 286 Fed. 370 (C. C. A. 9th). An administrative ruling of such long standing is entitled to considerable weight. *Helvering* v. *Reynolds Co.,* 306 U. S. 110.

CONCLUSION

Since there is no conflict among the Circuit Courts of Appeals the petition should be denied.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
THOMAS E. HARRIS,
NEWTON K. FOX,
Special Assistants to the Attorney General.

APRIL 1941.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 606. TAX ON AUTOMOBILES, ETC.

There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

* * * * *

(c) Parts or accessories (other than tires and inner tubes) for any of the articles enumerated in subsection (a) or (b), 2 per centum. * * *

[NOTE.—Subsections (a) and (b) refer to automobiles, automobile trucks and motorcycles.]

Treasury Regulations 46 (1932 Ed.):

ART. 4. *Who is a manufacturer or producer.*—As used in the Act, the term "producer" includes a person who produces a taxable article by processing, manipulating, or changing the form of an article, or produces a taxable article by combining or assembling two or more articles.

Under certain circumstances, as where a person manufactures or produces a taxable article for a person who furnishes materials and retains title thereto, the person for whom the taxable article is manufactured or produced, and not the person who actually manufactures or produces it, will be considered the manufacturer.

A manufacturer who sells a taxable article in a knockdown condition, but complete as

to all component parts, shall be liable for the tax under Title IV and not the person who buys and assembles a taxable article from such component parts.

ART. 41. *Definition of parts or accessories.*—The term "parts or accessories" for an automobile truck or other automobile chassis or body, or motorcycle, includes (a) any article the primary use of which is to improve, repair, replace, or serve as a component part of such vehicle or article, (b) any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, or (c) any article the primary use of which is in connection with such vehicle or article whether or not essential to its operation or use.

The term "parts and accessories" shall be understood to embrace all such parts and accessories as have reached such a stage of manufacture that they constitute articles commonly or commercially known as parts and accessories regardless of the fact that fitting operations may be required in connection with installation. The term shall not be understood to embrace raw materials used in the manufacture of such articles.

Spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of, automobile truck or other automobile chassis or motorcycles, are considered parts or accessories for such articles whether or not primarily designed or adapted for such use.

U. S. GOVERNMENT PRINTING OFFICE: 1941